No. 84-1179

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,
*Petitioner,*

vs.

JOE VERNON SEARS, an individual, in person and for all other persons similarly situated, ALBERT L. BENNETT, C. J. SKELTON, ARCHIE N. JONES, FOREST D. TOLLETT, JOHN W. LANDRUM, LAWSON C. SPENCER, THOMAS H. WHITE, EARLIE NASH, AUBREY A. ROBINSON, EDWARD RAWLINS, JOHN W. COLE, CHARLES MAJORS, JR., JESSE J. SMITH, PAUL H. STEWART, JIMMY E. BROWN, CARL E. CHESTER, RAY E. LANDRUM, RAYMOND WILLEY, ELGIE CROW and ELLIS JOHNSON, CRISCEL KEMP, A. M. BENNETT, A. L. WOOLFOLK, T. C. LUCKEY, W. W. SEYMOUR, THE BROTHERHOOD OF SLEEPING CAR PORTERS, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 18, 1985

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a railroad craft labor union, which maintained and enforced historic jurisdictional and seniority rights under its collective bargaining obligations to its craft members, can be liable for back pay to non-craft employees under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(g), for the failure to hire or promote the non-craft employees to positions in the craft, where the employer had and exercised sole authority to hire and promote all employees.

2. Whether the railroad craft seniority system here involved, which is almost 100 years old, which has existed since the early days of railroading in the United States, and which existed prior to the formation of the non-craft employees, is "bona fide" and exempt under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(h).

3. Whether a sum of money (called a tax component) can be included as a part of a back pay award under Title VII, 42 U.S.C. §2000e-5(g), to compensate the members of the class for their additional tax liability as a result of receiving several years of back pay in a lump sum in a single year.

4. Whether a district court, having found a railroad and a railroad craft labor union liable to a class of employees under Title VII, 42 U.S.C. §2000e-2, must determine the degree of fault and responsibility of the union for the unlawful employment practices, and apportion the damages between the union and the employer according to their relative degrees of fault under 42 U.S.C. §2000e-5(g).

**LIST OF ALL PARTIES TO THE PROCEEDING**

Austin, Robert William
Bennett, A. M.
Bennett, Albert L.
Brown, Jimmy Eddie
Burton, Porter
Butler, Theodore
Cheers, William Howard
Chester, Carl Everett
Christopher, William D.
Cole, John Wesley
Collins, James Jr.
Combs, Willie
Crow, Elgie
Finley, Leon Albert
Garner, Gerald B.
Garner, Robert H.
Garth, James R.
Guest, George
Harris, Hansul L.
Henry, John S. Jr.
Hestle, Guy W.
Hollowell, Robert Luther
Hunter, Obie F.
Jackson, James Paul
Jenkins, Herbert Leroy
Johnson, Ellis
Jones, Archie Newman
Kemp, Criscell
Kern, Donald Emil
Knighton, Frank C.
Knighton, Herbert C.
Landrum, John Wesley
Lewis, Clarence
Luckey, Theodore C.
Majors, Charles Allen

McGaugh, Eugene E.
Mitchell, Marion R.
Moore, Sherwood
Nash, Earlie
Papin, Bobbie Charles
Patillo, Walter
Preston, Leroy
Prince, Luther Terrance
Rawlins, Edward W.
Reynolds, Pink
Robinson, Aubrey A.
Robinson, Cecil M.
Robinson, Vernon M.
Sears, Joe Vernon
Seymour, W. W.
Shelby, John W.
Skelton, Clifford J.
Smith, Jesse John A.
Smith, Vaughan Henry
Southall, Levi E..
Spencer, Lawson Cole
Steward, William
Stewart, Paul Henry
Talbert, Samuel Marvin Jr.
Thaw, Baylon Kirkpatrick
Tollett, Forest P.
Wagner, Ray Orval
Walker, Oscar Alfred
White, Thomas Henry
White, Thomas James
Wiley, Raymond Iven
William, Cecil B.
Williams, George L.
Williams, Wilborn
Wimberly, Offie
Woolfolk, Arthur

Wright, Obie
The Brotherhood of Sleeping Car Porters
The Atchison, Topeka & Santa Fe Railway Co.
United Transportation Union, successor to the
Brotherhood of Railway Trainmen

## TABLE OF CONTENTS

Questions presented for review ..... i

List of all parties to the proceeding ..... ii

Table of contents ..... v

Table of authorities ..... vii

Reference to the official and unofficial reports ..... 1

Jurisdiction ..... 2

Statutory provisions involved ..... 2

Statement of the case ..... 4

Reasons for granting the writ:

1. The United States Court of Appeals for the Tenth Circuit has decided the question of liability for back pay of a labor union in a Title VII case in conflict with applicable decisions of this Court; it has decided an important federal question on the liability of a labor union for back pay under Title VII which has not been, but should be, settled by this Court ..... 9

a. The decision of the United States Court of Appeals for the Tenth Circuit is contrary to this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission,* 458 U.S. 219 (1982), and raises an important federal question on the liability of a labor union for back pay under the "responsibility" standard of 42 U.S.C. § 2000e-5(g) .. 9

b. The Tenth Circuit has decided a federal question in conflict with this Court's decision in *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982) ..... 10

c. The Tenth Circuit's decision is in conflict with *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), because there was no showing of discriminatory intent by UTU and because the Tenth Circuit did not follow the proper standard of appellate review ..... 12

d. The Tenth Circuit's decision is directly contrary to this Court's decision in *American Tobacco Company v. Patterson,* 456 U.S. 63 (1982) ..... 14

2. The decision below raises significant and recurring questions concerning the liability of a Title VII defendant for an additional sum of back pay called a tax component to compensate the class for tax disadvantages in receiving several years of back pay in a lump sum in a single year ..... 16

a. The Tenth Circuit's decision to award a tax component is directly contrary to this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission,* 458 U.S. 219 (1982) because it would impair the conciliation process ..... 16

b. The Tenth Circuit's decision is directly contrary to decisions of other circuits barring the award of compensatory damages in a Title VII case. ..... 16

3. The decision below raises significant and recurring questions concerning the liability of a labor union under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2, when the district court, after finding Title VII liability on the part of the labor union and the railroad employer, fails to determine their relative degree of fault and to apportion damages in accordance with 42 U.S.C. §2000e-5(g). ..... 17

a. The Tenth Circuit's decision is directly contrary to decisions of this Court and of other circuits which require the district court to apportion liability between the union and the employer. ..... 18

b. The decision of the Tenth Circuit raises an important federal question on the effect of a settlement by one party defendant on the liability of a nonsettling defendant in a Title VII case ..... 19

Conclusion ..... 23

Appendix .....(separately bound)

## TABLE OF AUTHORITIES

**Cases:**

Albermarle Paper Company v. Moody, 422 U.S. 405 (1975) ..... 17, 22

American Tobacco Company v. Patterson, 456 U.S. 63 (1982) ..... 14, 15

Bowen v. United States Postal Service, 459 U.S. 212 (1983) ..... 19, 22

DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) ..... 17

Ford Motor Company v. Equal Employment Opportunity Commission, 458 U.S. 219 (1982).....9, 10. 16. 17

Franks v. Bowman Transportation Company, 424 U.S. 747 (1976) ..... 15

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) ..... 10, 11

Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978), *cert. denied,* 441 U.S. 932 (1979) ..... 17

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... 12

Johnson v. Goodyear Tire & Rubber Company, 491 F.2d 1364 (5th Cir. 1974) ..... 18

Lewis v. Tobacco Workers' International Union, 577 F.2d 1135 (4th Cir. 1978) ..... 15

Myers v. Gilman Paper Corporation, 544 F.2d 837 (5th Cir.), *cert. dismissed,* 434 U.S. 801 (1977) ..... 18

Northwest Airlines, Inc. v. Transport Workers' Union, 451 U.S. 77 (1981) ..... 21

Parson v. Kaiser Aluminum and Chemical Corporation, 583 F.2d 132 (5th Cir. 1978), *cert. denied,* 441 U.S. 968 (1979) ..... 18

Patterson v. Youngstown Sheet and Tube Company, 659 F.2d 736 (7th Cir.), *cert. denied,* 454 U.S. 1100 (1981) ..... 10, 18

Pullman-Standard v. Swint, 456 U.S. 273 (1982) ..... 12, 13

United States v. United States Steel Corporation, 520 F.2d 1043 (5th Cir. 1975), *cert. denied,* 429 U.S. 817 (1976) ..... 18

Vaca v. Sipes, 386 U.S. 171 (1967) ..... 19, 21, 22

**Statutes:**

42 U.S.C. Section 1981 ..... 11

42 U.S.C. Section 2000e-2 ..... 17

42 U.S.C. Section 2000e-2(c) ..... 2, 10

42 U.S.C. Section 2000e-2(h) .....2, 12, 14

42 U.S.C. Section 2000e-5(g) .....3, 10, 17, 18

45 U.S.C. Section 151 ..... 5

Federal Rule of Civil Procedure 23(b)(2) ..... 4

Federal Rule of Civil Procedure 52(a) ..... 13

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### REFERENCE TO THE OPINIONS BELOW

*Sears v. Atchison, Topeka & Santa Fe Railway Company,* 454 F. Supp. 158 (D. Kan. 1978) (order concerning liability); 19 FEP Cases (BNA) 1007 (D. Kan. 1978) (order concerning seniority and formula for back pay relief), *aff'd in part rev'd in part and remanded,* 645 F. 2d 1365 (10th Cir. 1981), *cert. denied,* 456 U.S. 964 (1982); *on remand in the district court,* 30 FEP Cases (BNA) 1084 (D. Kan. 1982), *aff'd* 36 FEP Cases 785 (10th Cir. 1984).

## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered December 10, 1984, and this Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

Section 2000e-2(c)

It shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 2000e-2(h)

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206 (d) of Title 29.

Section 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a

member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

## STATEMENT OF THE CASE

This was a class action brought in 1972 by Joe Vernon Sears as a train porter employed by Defendant Atchison, Topeka & Santa Fe Railway Company (Santa Fe) against Santa Fe and United Transportation Union (UTU) charging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Joe Sears filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) in March, 1966, against Santa Fe and UTU's predecessor. UTU is the successor by merger effective January 1, 1969, to Brotherhood of Railroad Trainmen (BRT), which represented brakemen, and Order of Railway Conductors and Brakemen (ORC & B), which represented conductors. The Brotherhood of Sleeping Car Porters (BSCP), the union representing the train porter's craft on the Santa Fe, was subsequently joined as a party-plaintiff. The suit alleged discrimination resulting from the railroad's job structure for brakemen (whites) and train porters (blacks). Later proceedings made clear that the monetary claims of back pay were solely based on charges of discrimination resulting from the failure to promote the train porters to positions as brakemen.

The case was tried entirely on the basis of stipulated facts. The action was certified as a class action under Rule 23(b)(2) Federal Rules of Civil Procedure. Plaintiff Joe Vernon Sears was named as class representative on behalf of himself and a class comprised of all black train porters who had been

employed by Santa Fe during the period beginning July 2, 1965, and who have employed at any time as a train porter. Prior to trial, Santa Fe compromised claims against it for back pay and attorney's fees and remained as a party for purposes of seniority and injunctive relief only.

The hiring and promoting of all employees has always been a retained right of Santa Fe, and all such authority was exercised exclusively by Santa Fe. UTU never had, nor exercised, any hiring or transfer authority. At no time has membership in UTU or any other labor union been a condition prior to employment for any person of any race for hire or promotion by Santa Fe into any craft.

UTU and its predecessors have represented members of the crafts of brakemen and conductors since 1868. From 1868 until 1966, Santa Fe was a "open shop" employer and membership in a union was not a condition of employment. Since 1966, Santa Fe has been a "union shop" employer and membership in a union, certified to represent the employee craft by the Railway Labor Act, 45 U.S.C. §151, et seq, is required within 30 days after employment in the craft.

UTU and its predecessors entered its first collective bargaining agreement with the Santa Fe in 1892. The agreement contains seniority provisions. The position of train porter was not created by the Santa Fe until March, 1899, seven years after the first known contract containing the seniority provisions. So far as is known, except for the Silsbee District in Southern Texas, all brakemen and conductors hired by Santa Fe until 1965 were white. So far as is known, all train porters have been black.

Train porters were used by Santa Fe only in passenger service. Brakemen had to spend years in the more dangerous freight and yard service before gaining sufficient seniority to obtain a braking job on a passenger train.

The railroad crafts here involved were denominated by the National Mediation Board, designating employees according to

traditional work functions under the Railway Labor Act. ORC & B and BRT were certified to represent the conductors and brakemen, respectively, in 1926. BSCP was certified to represent the train porters and chair car attendants in separate proceedings in April, 1946. Thereafter, each of these crafts was recognized as a separate craft under the Railway Labor Act and by the federal government in General Order 27 by the District General of Railroads.

In May, 1950, BSCP and Santa Fe executed a collective bargaining agreement for chair car attendants containing seniority provisions. No written collective bargaining agreement covering seniority provisions for train porters ever existed. The seniority system for Santa Fe train porters was established through custom and practice, recognized by the Train Service Board and National Railway Adjustment Board. The last train porter was hired by Santa Fe in 1956, nine years before the effective date of Title VII.

Seniority in any craft was not transferable from one seniority district to another, nor transferable from one craft to another. However, a train porter continued to accumulate seniority on a chair car attendant's roster after he began working as a train porter in addition to his train porter's seniority. The seniority system for brakemen and conductors was established under collective bargaining contracts negotiated separately by BRT and ORC & B with the Santa Fe. At all times the seniority date in either craft began when a person first worked in or was promoted to that craft.

In its findings of fact, the district court found that the certified bargaining representatives of brakemen had acted throughout the history of the railroad to ensure that braking duties were performed by its members. The court also found that in 1883, at the time of the first constitution of BRT, there was no "whites only" clause. The first "whites only" clause appeared by the 1939 constitution, well after the crafts had been established; it was removed by the BRT in 1960, five years before the effective date of Title VII.

Beginning not later than 1920, a dispute developed between the brakemen and the train porters concerning braking duties on Santa Fe trains. The BRT was ultimately successful. In Award 19324 issued October 14, 1959, the National Railroad Adjustment Board held that only those train porters holding a seniority date prior to April 20, 1942, could perform braking duties. All train porters with a seniority date subsequent to April 20, 1942, were demoted to chair car attendants and could no longer work as train porters. During the dispute, in 1932, the general chairman for the BRT, H.W. Cross, sent a series of letters to the Santa Fe proposing negotiations for the consolidation of the seniority of brakemen and train porters on all divisions of Santa Fe's eastern and western lines. Santa Fe responded that it would not negotiate such a consolidation because the BRT had not represented the train porters.

On February 7, 1965, certain unions (not including either UTU or BSCP) entered into an agreement with the railroads, including Santa Fe, providing protection to the employees covered therein (February 7 agreement). The protection included guaranteed income but prohibited the carriers from transferring covered employees into other employment. In 1966, BSCP and Santa Fe extended this agreement to include train porters and chair car attendants. UTU was not a party to this agreement; BSCP took steps to ensure that Santa Fe followed the agreement.

With railroad passenger traffic declining, some chair car attendants applied to Santa Fe for employment in other crafts, including brakemen positions. They offered to surrender their February 7 protection and former seniority to accept this opportunity. BSCP formally objected but subsequent negotiations resulted in an agreement in 1971 between Santa Fe and BSCP permitting Santa Fe to assign train porters to positions as brakemen, retaining previously accumulated seniority as chair car attendants (prior to 1971, most individuals did not request brakemen's jobs because they were not willing to give up their

chair car attendant seniority in order to accept these positions from Santa Fe). A number of individuals availed themselves of the 1971 agreement. The February 7 (1965) agreement requiring these individuals to give up their chair car attendant seniority in order to accept positions as brakemen was negotiated between BSCP and the Santa Fe in 1966. UTU had nothing to do with this agreement, and was powerless to intercede on behalf of the train porters.

The district court found that the seniority system was neutral on its face and applied equally to all brakemen. It further found that the structure of the separate crafts was rational and in accordance with industry practice, being consistent with Railway Labor Act precedent. It found that the crafts had been recognized by the federal government and its agencies and that the separate crafts had separate certified bargaining representatives under the Railway Labor Act. The district court further found that the crafts had been denominated as separate crafts by the National Mediation Board under the Railway Labor Act and were recognized by the United States Government by Supplement No. 12 to General Order 27 in 1918. It found that the separate crafts were in accordance with industry practice and that the craft structure on the Santa Fe had existed in substantially the same form since the late 1800's and had existed on other railway lines in the United States in the same form. It found that UTU had no liability for post-act discriminatory conduct, for it neither had, nor exercised any hiring and transfer authority and therefore did not engage in any employment conduct which affected the Plaintiffs or class members. It found that UTU had no back pay liability to any train porter demoted by the National Railroad Adjustment Board.

## REASONS FOR GRANTING THE WRIT

**1. The United States Court of Appeals for the Tenth Circuit has decided the question of the liability for back pay of a labor union in a Title VII case in conflict with applicable decisions of this Court; it has decided an important federal question on the liability of a labor union for back pay under Title VII which has not been, but should be, settled by this Court.**

**a. The decision of the United States Court of Appeals for the Tenth Circuit is contrary to this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) and raises an important federal question on the liability of a labor union for back pay under the "responsibility" standard of 42 U.S.C. §2000e-5(g).**

This Court held in *Ford Motor* that an employer can toll the accrual of back pay liability under Title VII by unconditionally offering the claimant the job previously denied without offering seniority retroactive to the date of the alleged discrimination. The stipulated evidence in this case was that UTU was without power or authority to hire or promote the train porters to positions as brakemen. Back pay was awarded against UTU strictly on a formula of the difference between a train porter's earnings and a brakemen's earnings. UTU was found liable for back pay relief for failure to promote persons when it had no power or authority to cause the promotions to occur.

This Court should consider whether a labor union should be liable for back pay for discriminatory failure to promote when the labor union does not have the ability or authority to cure the discrimination (toll the accrual of back pay). The stipulated evidence makes clear in this case that UTU had no such ability or authority.

*Ford Motor* makes clear that back pay is not an automatic and mandatory remedy, but rather one which the courts should invoke in their discretion as a matter of equity. Back pay should not be awarded mechanically. 458 U.S. at 226. To avoid a

mechanical application of back pay as a remedy, an analysis should be made on the principle of legal causation. Back pay should be awarded under *Ford Motor* on the principle that the "wrongdoer" has the ability to right the wrong and fails to do so.

This Court should determine standards based upon legal causation when back pay should be awarded against a labor union. Here, the individuals involved claimed discrimination based upon a failure to promote them from positions as train porters to positions as brakemen. UTU had no power to make the promotions. 42 U.S.C. §2000e-5(g) provides that back pay may be awarded against a labor organization, but only where the labor organization is responsible for the unlawful employment practice. In this case, Santa Fe was, by stipulated facts, responsible for the failures to promote. Since UTU had no authority or power to cause the promotions to occur, the remedy of back pay was applied mechanically rather than on the basis of legal causation. Where there is a violation of Title VII, but an insufficient nexus between the union's behavior and the injuries suffered by the class, the court should grant injunctive relief and necessary affirmative action to correct the effects of the employment practices but should not award back pay against the union. *Patterson v. Youngstown Sheet and Tube Co.*, 659 F.2d 736 (7th Cir.), *cert. denied,* 454 U.S. 1100 (1981). UTU simply had no power to "cause or attempt to cause" Santa Fe to commit or refrain from these discriminatory promotion practices under 42 U.S.C. §2000e-2(c)(3). For the foregoing reasons, the decision of the Court of Appeals for the Tenth Circuit is in conflict with this Court's decision in *Ford Motor,* and because this Court has not ruled on the application of these principles to a labor union, an important federal question arises in this case which has not been, but should be, settled by this Court.

**b. The Tenth Circuit has decided a federal question in conflict with this Court's decision in *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982).**

This Court holds in *General Building Contractors* that under 42 U.S.C. §1981, each co-defendant's liability must be determined based upon that defendant's responsibilities. There can be no vicarious liability by one defendant based upon another defendant's acts, especially on the issue of intent. In the context of this case, the rule means that the legal responsiblity of UTU is determined by its own duties, responsibilities and powers. The analysis of UTU's liability by the courts below in this case was based upon an intent to discriminate established with respect to Santa Fe but not with respect to UTU. The activities of Santa Fe have been attributed to UTU.

At issue is the very existence of our national labor policy and the relationship between an employer and the unions that represent its employees. In *General Building Contractors,* the district court erroneously found an employer liable for discrimination caused primarily by a union because the employer retained the power to oppose union discrimination. This Court held that the power to oppose the union is not tantamount to a right to control the union.

The Tenth Circuit in its 1981 opinion finds that UTU acquiesced to the discriminatory practices (failure to promote the train porters) of Santa Fe and is therefore liable. 645 F.2d at 1375. The issue, then, is the duty, if any, imposed on UTU by the statute to oppose discriminatory failure to promote members of the class to positions as brakemen. The power to oppose is not equivalent to a power to control the promotion practices of management of Santa Fe.

This Court holds in *General Building Contractors* that when a duty is imposed by the civil rights laws to refrain from intentionally discriminating, it does not make all unions and employers "guarantors of the workers' rights as against third parties who would infringe them." 458 U.S. at 396. The Tenth Circuit automatically assumed that it was within the power of the union to prevent the employer from discriminating, contrary to *General Building Contractors.* The Tenth Circuit's opinion

that UTU indirectly encouraged discrimination by Santa Fe is a finding of vicarious liability on UTU. The fact that management of Santa Fe retained the sole right to hire and promote made such duties "non-delegable" to UTU. UTU had no power (therefore no duty) to control the promotion practices involved.

**c. The Tenth Circuit's decision is in conflict with *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), because there was no showing of discriminatory intent by UTU and because the Tenth Circuit did not follow the proper standard of appellate review.**

Under the civil rights statutes, a plaintiff can establish a prima facie Title VII violation upon a showing of policies or practices that are neutral on their face and in intent but that nevertheless discriminate in effect. However, the statute's treatment of seniority systems establishes an exception to these general principles. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 349 (1977). The so-called seniority exception is found at 42 U.S.C. §2000e-2(h). This Court's decision in *Swint* holds that under the seniority exception a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. This Court states:

> Thus, any challenge to a seniority system under Title VII will require a trial on the issue of discriminatory intent: Was the system adopted *because* of its racially discriminatory impact? (emphasis added) 456 U.S. at 277.

The courts below do not reach that primary question, although they do consider factors which this Court reaffirmed in *Swint*.

The Tenth Circuit, in its 1981 opinion, finds that it is unnecessary to find that the union (UTU) entered the agreement with the intention of discriminating. 645 F.2d at 1375. This Court makes clear in *Swint* that acquiescence to the

discriminatory conduct of another party is not the equivalent of discriminatory purpose. This Court states, 456 U.S. at 289-290:

> Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

Acquiescence is not enough, and the Tenth Circuit's prior ruling that it is unnecessary to find that UTU entered the collective bargaining agreement with the intention of discriminating is directly contrary to this Court's decision in *Swint*.

*Swint* also holds that an intent to discriminate on account of race is a pure question of fact, subject to the "clearly erroneous" standard of Federal Rule 52(a). It is not a mixed question of law and fact. 456 U.S. at 287-288. Where, as here, the issue is the seniority exception to the Civil Rights Act, the findings of fact of a district court may not be set aside unless clearly erroneous.

The Tenth Circuit sets aside factual findings of the district court without finding them to be clearly erroneous. Disregarded are the findings of the district court on the rational structure of the separate crafts of porters and brakemen, recognized by the National Mediation Board, with the Tenth Circuit making its own findings that the crafts were irrational by being drawn along racial lines. The district court's findings on other factors are disregarded by the Tenth Circuit by changing the analysis or by choosing particular facts other than those chosen by the district court. The Tenth Circuit ignores the evidence and the findings of the district court which clearly establish that the chair car attendants and their subclass had a status not as the result of negotiations from collective bargaining but rather as a result of rulings of the National Railroad Adjustment Board. The Tenth Circuit reverses the district court and awards back pay to this subclass without setting aside any findings as clearly erroneous, and substitutes its own findings.

The Tenth Circuit disregards the finding of the district court that from 1868 until 1966 Santa Fe was an open shop employer and that membership in a labor union was not a condition of employment. It disregards the fact that the promoting of employees is a retained right of management of the Santa Fe. It disregards the finding of the district court that the bargaining representatives of the brakemen were acting to ensure that braking duties were performed by their members. These findings of the district court were not found by the Tenth Circuit to be clearly erroneous, and they should not have been set aside. This Court has specifically prohibited the courts of appeals from imposing liability on Title VII defendants in this manner. 456 U.S. at 291.

**d. The Tenth Circuit's decision is directly contrary to this Court's decision in *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982).**

The so-called seniority exception to the Civil Rights Act, 42 U.S.C. §2000e-2(h) has been construed by this Court in *American Tobacco* to establish that a seniority system that has a discriminatory impact is not sufficient alone to invalidate the system; actual intent to discriminate must be proved. This Court states that the legislative history of the Civil Rights Act reveals that Congress did not intend seniority systems to be lightly set aside, and promulgated this section to immunize seniority systems unless very specific findings of intent to discriminate are made. This Court states:

> Seniority provisions are of 'overriding importance' in collective bargaining...and 'are universally included in these contracts'...The collective-bargaining process 'lies at the core of our national labor policy...' Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies

> over the substantive terms of collective bargaining agreements. . .Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance. 456 U.S. at 76-77.

The court below in this case set aside and invalidated a railroad craft seniority system almost 100 years old, which has existed since the early days of railroading in the United States, and which existed prior to the formation of the train porter craft. Although there was established an unfortunate discriminatory impact on the train porters, the Tenth Circuit's decision is contrary to *American Tobacco* because there was no factual showing that UTU intended to discriminate. The Tenth Circuit states that it is unnecessary to find that the union entered the agreement with the intention of discriminating. 645 F.2d at 1375. This analysis ignores the lack of legal causation between the union's actions and the alleged discriminatory effects of hiring and promoting. Appropriate is *Franks v. Bowman Transportation Company,* 424 U.S. 747, 758 (1976), where this Court states:

> The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system.

A racially discriminatory hiring system could not expose UTU to liability where it concededly had nothing to do with hiring. As the Fourth Circuit has stated in *Lewis v. Tobacco Workers' International Union,* 557 F.2d 1135, 1144-1145 (4th Cir. 1978), where a union has nothing to do with hiring, it should be dismissed from a complaint charging discrimination in hiring practices. This Court should review these important seniority system questions in the context of labor union liability in the Title VII scheme.

**2. The decision below raises significant and recurring questions concerning the liability of a Title VII defendant for an additional sum of back pay called a tax component to compensate the class for tax disadvantages in receiving several years of back pay in a lump sum in a single year.**

**a. The Tenth Circuit's decision to award a tax component is directly contrary to this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) because it would impair the conciliation process.**

In *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982), this Court made clear that in determining a back pay award, the legislative history of Title VII requires a determination of the effect of the award on the conciliation process. The Court stated that the "large objectives" of Title VII require that uncertainty not be introduced into the conciliation process because the primary purpose of Title VII is conciliation at the administrative level. To inject into this process the tax effects of each worker, which would include reference to such factors as income from other sources, marital status, family size, itemized deductions and tax credits for each individual, would also present serious administrative problems and impair the conciliation process by increasing the number of claimants wanting an additional award for their supposed tax disadvantages. Decreasing the effectiveness of the conciliation process would result in substantial increases in litigation as claimants contest either their right to a premium for income taxes or the method used in calculating their back taxes. The decision below would constitute a vast expansion of Title VII damages with tremendous harm to the conciliatory process, without any Congressional authorization whatsoever.

**b. The Tenth Circuit's decision is directly contrary to decisions of other circuits barring the award of compensatory damages in a Title VII case.**

*Albermarle Paper Company v. Moody,* 422 U.S. 405 (1975) and its progeny have clearly established the various elements comprising a back pay award (salary and fringe benefits) under the "make whole" provisions of Title VII, and a tax component has never been included. In this regard, then, the decision below is in conflict with all Title VII decisions by offending the generally understood use of the term "pay" in *Albermarle* as compensation or wage received from an employer by an employee and in awarding compensatory damages, which until now were not recoverable under Title VII. *DeGrace v. Rumsfeld,* 614 F.2d 796 (1st Cir. 1980); *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192 (6th Cir. 1978), *cert. denied,* 441 U.S. 932 (1979). Any tax disadvantage the class members may sustain under the laws, rulings, and regulations in force at the time payment of back pay is made to them is not recoverable because it represents compensatory damages and is not a benefit paid by employers to employees as compensation for services, the only items of damages permitted in a back pay award.

Therefore, because of the serious conflict the decision below has with *Albermarle,* concerning the elements of a back pay award, and with decisions of other circuits that compensatory damages are not recoverable, the likelihood that the decision will result in a substantial increase in litigation concerning the tax aspects of a back pay award and because the case will substantially impair the conciliatory process, which *Ford Motor* prohibits, this court should grant this petition for writ of certiorari to review these important federal questions.

**3. The decision below raises significant and recurring questions concerning the liability of a labor union under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2, when the district court, after finding Title VII liability on the part of the labor union and the railroad employer, fails to determine their relative degree of fault and to apportion damages in accordance with 42 U.S.C. §2000e-5(g).**

**a. The Tenth Circuit's decision is directly contrary to decisions of this Court and of other circuits which require the district court to apportion liability between the union and the employer.**

Although requested to do so by UTU, the district court refused to determine the relative degree of fault of UTU and Santa Fe in causing the discrimination suffered by the Plaintiff class members. The refusal to do so is a direct conflict with decisions of other circuits which require the district court to apportion Title VII liability between the union and the railroad. *Patterson v. Youngstown Sheet and Tube Company,* 659 F.2d 736 (7th Cir.), *cert. denied,* 454 U.S. 1100 (1981); *Parson v. Kaiser Aluminum and Chemical Corporation,* 583 F.2d 132, 134 (5th Cir. 1978, *cert. denied,* 441 U.S. 968 (1979); *Myers v. Gilman Paper Corporation,* 544 F.2d 837, 851-852 (5th Cir.) *cert. dismissed,* 434 U.S. 801 (1977); *United States v. United States Steel Corporation,* 520 F.2d 1043 (5th Cir. 1975), *cert. denied,* 429 U.S. 817 (1976); *Johnson v. Goodyear Tire & Rubber Company,* 491 F.2d 1364, 1382 (5th Cir. 1974). The district court should have considered the relative responsibilities of union and employer for back pay caused by the loss of brakeman's wages by the train porters. Santa Fe was found to have violated provisions of Title VII, along with UTU, however, the district court refused to decide the apportionment issue. The duty to apportion damages is clearly set forth in 42 U.S.C. §2000e-5(g) which provides in pertinent part:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate...with or without back pay (payable by the employer...or labor organization, as the case may be, *responsible for the unlawful employment practice*)...(emphasis added).

In its order, the court of appeals held that apportionment was not necessary because the wrong committed by UTU "was a

separate wrong from that of the employer [Santa Fe], defined by separate subsections of the Statute." However, because there were two "wrongs" is the very reason why a hearing must be held to determine how much damage was caused by UTU. In *Vaca v. Sipes,* 386 U.S. 171 (1967), plaintiff brought suit against his former employer for breach of a collective bargaining agreement and against his union for breach of its duty of fair representation in the handling of plaintiff's grievance. This Court held:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or most all of [the employee's] damages would still be attributable to his allegedly wrongful discharge by [the employer]. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.

386 U.S. at 197-198. The rule in *Vaca* was followed as recently as 1983 in *Bowen v. United States Postal Service,* 459 U.S. 212 (1983), in which the Court held that the employee's damages must be apportioned between the employer which breached the collective bargaining agreement and the union which refused to process the grievance. Fairness demands that Title VII parties be liable only for the damages they caused.

**b. The decision of the Tenth Circuit raises an important federal question on the effect of a settlement by one party defendant on the liability of a nonsettling defendant in a Title VII case.**

UTU is not suggesting that following an apportionment of the fault of the parties that Santa Fe would be liable for any additional amount of back pay if what Santa Fe paid pursuant to its settlement agreement with the class was determined to be less than its relative degree of fault or the damages which it caused, rather, that the fault and responsibility of UTU and Santa Fe must each be determined.

The duty of the district court to determine the relative fault of the parties and to apportion damages persists irrespective of the settlement reached between Santa Fe and the class. Santa Fe remained a party to the lawsuit after settling its back pay liability and was found to have violated Title VII by discriminating against the class members. Following the settlement, the district court determined the total back pay damages of the class members (approximately $5,960,000), then deducted from this amount the proceeds received by the class from its settlement with Santa Fe (approximately $130,000) and found UTU responsible for the balance, without determining the relative fault of UTU and Santa Fe and without making any determination from the evidence of the amount of damages each defendant caused, although each was found to have violated Title VII.

This application of *pro tanto* reduction by the district court is harsh and unjust and directly contrary to the district court's obligation to apportion liability for back pay according to the responsibility of the union and the employer. It results in a determination of liability on a nonsettling party bearing no reasonable relationship to the actual degree of fault of the parties or the damages which each caused. The district court, sitting as a court of equity, did not do equity, but simply applied a mechanical formula.

A system in which a settlement by one Title VII defendant effects a dollor-for-dollar reduction in the discriminated employee's recovery against other, nonsettling defendants would deprive the plaintiffs of a favorable settlement agreement when the settling party contributes what turns out to be more

than its proportionate share of the fault, or the damages it caused. In such a case, the nonsettling party would enjoy the benefit of plaintiff's bargain. No principle of Title VII or equity requires that the nonsettling party be awarded this benefit and not be called upon to compensate the discriminated employees for the harm it caused. In summary, a *pro tanto* reduction by its nature is dependent upon the terms of the settlement agreement, to which the nonsettling defendant was not a party nor bound, to affix the liability of the nonsettling party. The share of the nonsettling defendant, UTU in the present case, is based solely on the terms of a collateral settlement agreement and not with regard to the relative degree of fault of UTU and Santa Fe or with regard to what damages were caused by each party.

A settlement contract in Title VII must operate to satisfy that portion of the back pay award that corresponds to the degree of fault of the settling party. This rule would provide incentive for plaintiffs to settle with all parties and permit the remaining Title VII defendant to negotiate a settlement on the same footing as the first defendant to settle. The rule would not impose on the nonsettling defendants any of the settling defendant's share of the loss and would not let the plaintiffs' advantageous settlement agreement with one defendant become a windfall to the remaining defendants. Adoption of these principles would carry through to Title VII the Court's direction in *Vaca v. Sipes* that responsibility for damages be based on the fault of the parties, would provide a framework for determining the effects of a settlement which could in fairness be applied in all situations and recognizes the freedom to contract for settlements between employees and those responsible in whole or in part for their damages. The freedom to contract includes the freedom to make a bad bargain.

The court of appeals stated that the precise issue in this case has never been decided by the Supreme Court, but believed *Northwest Airlines, Inc. v. Transport Workers' Union*, 451 U.S. 77 (1981), to be similar. In *Northwest Airlines*, a female cabin at-

tendant, on behalf of herself and others similarly situated, brought an action against her employer for violations of the Equal Pay Act and Title VII. After entry of judgment against it, the airline commenced a separate action against several unions representing the cabin attendants for contribution. 451 U.S. at 81-82. This Court held that the complaint should be dismissed because there is no implied statutory right or federal common law right to contribution and it would not create one under either the Equal Pay Act or Title VII. 451 U.S. at 95, 98. In *Northwest Airlines,* the unions were not co-defendants with the employer in the underlying Title VII proceeding. The question faced by the Court was whether an *independent* cause of action for *contribution* exists under Title VII by a party found to have violated its provisions against one not a party. The UTU's claim concerning the apportionment of damages is based upon the relative degree of fault of two parties who were co-defendants in the lawsuit and who were both found to have violated Title VII. Nor is the rule that damages must be apportioned between the employer and union a new remedy, but rather is an equitable right which courts have recognized in the Title VII scheme. *Albermarle Paper Company v. Moody,* 422 U.S. 405 (1975).

Because the decision below is in direct conflict with decisions of other courts of appeals and with this Court's decisions in *Vaca v. Sipes* and *Bowen v. United States Postal Service,* this Court should grant this petition for writ of certiorari to review these important federal questions. The questions presented have arisen in other cases and certainly can be expected to arise in the future. A clear expression by this Court on the question will settle this case and all Title VII lawsuits commonly involving the situation when one of several parties found to have violated Title VII settles its responsibility for back pay with the discriminated employees. A decision by this Court will have a wide impact in the area of civil rights litigation. There are no peculiar facts presented in this case but rather the undisputed facts are representative of many others pending and likely to be presented in the future.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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January 18, 1985

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No.

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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,
*Petitioner,*

vs.

JOE VERNON SEARS, an individual, in person and for all other persons similarly situated, ALBERT L. BENNETT, C. J. SKELTON, ARCHIE N. JONES, FOREST D. TOLLETT, JOHN W. LANDRUM, LAWSON C. SPENCER, THOMAS H. WHITE, EARLIE NASH, AUBREY A. ROBINSON, EDWARD RAWLINS, JOHN W. COLE, CHARLES MAJORS, JR., JESSE J. SMITH, PAUL H. STEWART, JIMMY E. BROWN, CARL E. CHESTER, RAY E. LANDRUM, RAYMOND WILLEY, ELGIE CROW and ELLIS JOHNSON, CRISCEL KEMP, A. M. BENNETT, A. L. WOOLFOLK, T. C. LUCKEY, W. W. SEYMOUR, THE BROTHERHOOD OF SLEEPING CAR PORTERS, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## TABLE OF CONTENTS


Page

Appendix A:

Opinion whose decision is sought to be reviewed

Opinion of U.S. Court of Appeals for the Tenth Circuit filed and entered December 10, 1984 ..... 1

Appendix B:

Other applicable opinions and orders rendered in the case

District Court's Order filed 9-8-75 ..... 11

District Court's Order filed 6-14-78 ..... 15

District Court's Order filed 10-23-78 ..... 63

10th Circuit's Opinion filed 3-11-81 ..... 83

10th Circuit's Order filed 5-11-81 ..... 109

District Court's Order filed 7-22-81 ..... 111

U.S. Supreme Court's Order dated 5-3-82 ... 117

District Court's Order filed 7-1-82 ..... 118

District Court's Order filed 7-13-82 ..... 126

District Court's Order filed 10-25-82 ..... 132

District Court's Order filed 12-1-82 ..... 140

District Court's Order filed 2-16-83 ..... 166

District Court's Order filed 5-13-83 ..... 176

## APPENDIX A

PUBLISH

Filed Dec. 10, 1984

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-2549 & 83-1726

Joe Vernon Sears, an individual, in person and for all other persons similarly situated,

Plaintiffs-Appellees,

and

The Brotherhood of Sleeping Car Porters, and Ray E. Landrum, et al.,

Intervenor-Plaintiffs,

v.

The Atchison, Topeka & Santa Fe Railway, Company,

Defendants,

United Transportation Union, successor to Brotherhood of Railway Trainmen, a labor organization,

Defendants-Appellants,

Nos. 82-2550 & 83-1736

Mildred Collins, Executrix of the Estate of James Collins, Jr., Deceased,

Plaintiff-Appellee,

v.

United Transportation Union, a successor to Brotherhood of Trainmen, a labor organization,

Defendant-Appellant.

---

Appeal from the United States District Court
for the District of Kansas
(D.C. No. W-4946 and W-4963)

---

William Sitzer (William B. Smith, also of Dubail, Judge, Kilker, O'Leary & Smith, St. Louis, Missouri, and E. Lee Kinch, of Ratner, Mattox, Ratner, Ratner & Barnes, Wichita, Kansas, with him on the brief) for Defendant-Appellant United Transportation Union.

Terry G. Paup, Wichita, Kansas, (Jim L. Lawing, Wichita, Kansas, and Lee H. Woodard of Woodard, Blaylock, Hernandez, Pilgreen & Roth, Wichita, Kansas, with him on the brief) for Plaintiffs-Appellees.

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Before SETH, BARRETT, and LOGAN, Circuit Judges.

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LOGAN, Circuit Judge.

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The United Transportation Union appeals from the district court's order on remand concerning damages in this Title VII action. Appellee Joe Sears filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) in March 1966 against the Atchison, Topeka & Santa Fe Railway (Santa Fe) and the United Transportation Union's predecessor. Once the EEOC issued a right to sue letter, Sears filed this class action on behalf of the railroad's train porters alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17, based on discrimination resulting from the railroad's segregated job structure for brakemen (whites) and train porters (blacks).

The trial court ruled that Santa Fe and the union were liable to part of the class of train porters and awarded damages. *Sears v. Atchison, Topeka & Santa Fe Ry.*, 454 F. Supp. 158, 180 (D. Kan. 1978) (order concerning liability); *Id.*, 19 Fair Empl. Prac. Cas. (BNA) 1007, 1014-15 (D. Kan. Oct. 23, 1978) (order concerning seniority and back pay relief). This court reviewed that decision, affirming it in part, reversing it in part, and remanded the case to the trial court to fashion a back pay award for the entire class. *Sears v. Atchison, Topeka & Santa Fe Ry.*, 645 F.2d 1365 (10th Cir. 1981). After we denied the union's petition for rehearing the United States Supreme Court denied certiorari. 456 U.S. 964 (1982). On remand the district court issued an order responding to the directives in our opinion, *Sears v. Atchison, Topeka & Santa Fe Ry.*, 30 Fair Empl. Prac. Cas. (BNA) 1084 (D. Kan. Dec. 1, 1982), from which the union has appealed.

On appeal the union asserts the following: (1) that the court of appeals erred in its prior decision in finding the union liable for back pay and attorney's fees; (2) that the district court erred in holding the union liable to class members whom Santa Fe did not have to pay under a court-approved settlement agreement between Santa Fe and the class and in not limiting the union's liability to its relative degree of fault; (3) that the district court erred in permitting Sears to represent the entire class, rather than creating a separate subclass with its own class representative to represent the train porters who had a seniority date after April 20, 1942, and who were demoted from train porters to chair car attendants pursuant to a 1959 National Railroad Adjustment Board award; and (4) that the district court erred in including a tax component in the back pay award to class members. We reject each of these contentions and affirm the district court's judgment.

I

The union contends that we must reverse our prior judgment upholding the union's liability to the class because the decision

was inconsistent with four recent Supreme Court cases: *General Building Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982); *Ford Motor Co. v. EEOC,* 458 U.S. 219 (1982); *Pullman-Standard v. Swint,* 456 U.S. 273 (1982); and *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982). We will not dignify this argument by any extended discussion. We have examined the decisions and find nothing in them to convince us that we erroneously decided the earlier appeal. We also note that all of those cases were argued in the Supreme Court before it declined, on May 3, 1982, to review our prior opinion; two of the cited cases were decided before the Supreme Court denied certiorari and the other two were decided before the Court's term ended two months later. Under these circumstances we believe that if the Supreme Court had thought any of those decisions required reconsideration of our opinion, it would have granted certiorari and summarily remanded the case for our reconsideration in light of its determinations.

II

Relatively early in this litigation Santa Fe entered into a court-approved settlement agreement with the class that covered back pay relief and attorney's fees. *See* Order Approving Compromise and Dismissal of Back Pay and Attorney's Fees Claim (Sept. 8, 1975), R. III, 1094. Santa Fe remained in the litigation for determination of issues concerning its future practices and the seniority relief to be granted to current Santa Fe employees who were members of the class. The court explicitly approved the provision in the settlement agreement releasing Santa Fe from having to pay back pay and attorney's fees to porters who retired, became disability annuitants or died prior to May 1, 1972. R. III, 1096. Paragraph 9 of the settlement order expressly provided, however, that "this Order does not affect the liability issue of the United Transportation Union for back pay relief and attorney's fees [under Title VII]." R. III, 1097. In its initial decision on damages, the district court found that Santa Fe was not liable for additional money damages to any plaintiff,

beyond what it had paid in its settlement, but that the union was liable "for any additional monetary loss suffered by the train porter subclass members over and above the Santa Fe settlement . . . ." *Sears,* 19 Fair Empl. Prac. Cas. (BNA) at 1015.

Following our decision in the first appeal, the district court ordered the union to pay relief to a class of plaintiffs that included former porters or their representatives who had retired, become disability annuitants, or died prior to May 1, 1972—persons denied payment under the settlement agreement with Santa Fe. The court rejected the union's arguments that it was unfair for the union to be held liable to these persons when Santa Fe had escaped liability. *Sears,* 30 Fair Empl. Prac. Cas. (BNA) at 1086. The union makes the same unfairness argument on appeal. It also contends that the district court should have determined the relative fault of Santa Fe and the union and required the union to pay only that proportion of the total back pay award reflecting the union's degree of fault.

There might be merit in the contentions if this were an ordinary case of joint tortfeasors who were liable to each other for contribution. *See Restatement (Second) of Torts* §§ 886A & comment m, at 337, 343-44 (1979) (listing three alternative solutions to the problem created by settlement with and release of one tortfeasor with respect to the right of other tortfeasors to seek contribution from the one released). This case is a Title VII action, however. Although the Supreme Court has never considered the situation before us, it has decided a closely analogous case. It refused to find a right of contribution for an employer held liable under Title VII against a union that was not joined in the original suit but nevertheless was partly responsible for the discriminatory treatment. *See Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 98 (1981). The Supreme Court stated that it was unwilling to create a contribution remedy for a statutory violation when Congress had not manifested any intent that a right of contribution should exist. *Id.* at 94-95, 97. *Cf. Texas Industries, Inc. v.*

*Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (antitrust defendants not entitled to contribution from coconspirators). Further, the wrong that the union committed was a separate wrong from that of the employer, defined by separate subsections of the statute. *See* 42 U.S.C. § 2000e-2(a), (c). *Cf. Dobson v. Camden*, 725 F.2d 1003, 1005-06 (5th Cir. 1984) (en banc) (no problem arises requiring contribution or credit for settlement in § 1983 suit when no joint liability existed between codefendants).

Surely the law should encourage settlement of Title VII disputes. If we were to hold the trial court erred in not requiring further contribution from Santa Fe, or that it should have limited the union's liability to its "share" of the fault, we would discourage settlement of these cases. Santa Fe would not have settled if it had known it would still remain liable in the event the nonsettling union defendant lost the case. Similarly, the aggrieved porters also would have been unlikely to settle with Santa Fe if they risked being made less than whole because of a subsequent court finding on the union's percentage of fault. The instant case illustrates the desirability of settlement and the cruel effect of litigation delays on older class members; more than eighteen years have passed since Sears brought his complaint to the attention of the EEOC.

The cases approving of district courts' exercise of discretion in allocating damages among nonsettling defendants, *e.g.*, *Parson v. Kaiser Aluminum & Chemical Corp.*, 583 F.2d 132, 133-34 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *Meyers v. Gilman Paper Corp.*, 544 F.2d 837, 851-52 (5th Cir.), *rev'd in part on other grounds*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1060 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976), are not inconsistent with requiring that nonsettling defendants pay the difference between the damages paid by settling defendants and the total necessary to make the victims whole. The district court here allowed a credit against the judg-

ment for the amount Santa Fe had already paid in its separate settlement. The union complains that because the settlement Santa Fe made appears to be a favorable one to Santa Fe the union is left with the burden of paying most of the plaintiffs' damages. Of course, under the court's order had Santa Fe settled for more than its proportionate share, the union would have benefitted by having to pay only the remaining amount necessary to make the victims whole.

Santa Fe's settlement with the class expressly provided that it did not affect the union's liability for back pay or attorney's fees. Any objections the union had to that provision should have been raised as an objection in the district court before the court approved the settlement. Instead the union waited to challenge the effect of this provision until the case was remanded after the union had been found liable, and the case had been appealed the first time. *See* Motion to Limit Damage Award (Aug. 24, 1981), R. VII, 2534-36. We hold that the district court acted properly in determining the damages chargeable against the union.

III

The union claims that the district court erred in failing to designate a separate subclass representative for the train porters who had a seniority date after April 20, 1942, and who were demoted from train porters to chair car attendants pursuant to a 1959 National Railroad Adjustment Board award. We hold that the union has waived its right to make this objection. The union consented to the district court's original order entered August 4, 1975, certifying Joe Sears as class representative for the class comprised of "all Black Train Porters employed by Santa Fe, at any time, as a Train Porter and who have been in the employment of Santa Fe during the period from July 2, 1965, to the present." Order Determining That Action is Maintainable As Class Action, R. II, 967-68. Throughout the trial, the hearing on damages, and the first appeal, the union never

objected, and must be deemed to have consented, to having Sears as class representative for all Santa Fe train porters, including those later demoted as a result of the 1959 award. *See* Pretrial Conference Order (Sept. 16, 1977), R. IV, 1687, 1695; Stipulation of Facts Subject To Objections of Relevancy and Materiality (Feb. 8, 1978), R. V, 1876, 1882-83; Brief for United Transportation Union as Appellant and In Response to Brief of Sears et al. as Cross-Appellee, No. 78-1995, at 28-29 (filed with 10th Cir. July 19, 1979).

We recognize that the district court may redefine the class to include serveral subclasses after it has initially certified the class. *See* 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1790, at 186 (1972). The district court acknowledged in its initial decision that differences existed within the class represented by Joe Sears because some of the porters had been demoted as a result of the 1959 Award. *See Sears,* 19 Fair Empl. Prac. Cas. (BNA) at 1010. The court awarded different relief to the different groups. *Id.* at 1010-12. It also distinguished between demoted porters who had applied for transfer and/or promotion and those who had not. *Id.* at 1012. But the court's analysis was made in the context of the original certification as one class with Joe Sears as its sole representative. The union did not seek separate subclass representatives before the trial court ruled on liability and damages. Indeed, the union approved of the separate treatment and raised no objection in its first appeal to the fact that the district court had not named separate subclass representatives. *See* Brief For United Transporation Union as Appellant and In Response to Brief of Sears et al. as Cross-Appellee, No. 78-1995, at 28-29 (filed with 10th Cir., July 19, 1979). As a result, when we reviewed the district court's award of relief and ordered a different remedy, we gave no consideration to having separate subclass representatives. Instead, we suggested a method for treating the demoted porters differently in calculating back pay, to reflect their different circumstances, but all within the context of a single class represented by Joe Sears. *See Sears,* 645 F.2d at 1378-79. The

union has waited too long to seek separate subclass representatives.[1] Therefore, we find no error in the district court's order denying the union's motion for separate representatives.

IV

Finally, we hold that the district court did not abuse its discretion when it included a tax component in the back pay award to compensate class members for their additional tax liability as a result of receiving over seventeen years of back pay in one lump sum. As we stated in our prior opinion, the trial court has wide discretion in fashioning remedies to make victims of discrimination whole. *Sears,* 645 F.2d at 1378; *see also Ford Motor Co. v. EEOC,* 458 U.S. 219, 230 (1982); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 364 (1977). A tax component may not be appropriate in a typical Title VII case. But this case presents special circumstances in view of the protracted nature of the litigation. The court-ordered back pay awards will likely place the living members of the class in the highest income tax bracket on much of the back pay they now receive. Even if the class members income average, they can now only consider the three years preceding the computation year. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 173(a), 98 Stat. 494, 703 (1984) (to be codified at I.R.C. § 1302(c)(2)). Apparently nearly 40% of the class members have died. Estates of deceased taxpayers are not eligible for income averaging. Treas. Reg. § 1.1303-1(a). In *Blim v. Western Electric Co.,* 731 F.2d 1473, 1480 (10th Cir.), *cert. denied,* 53 U.S.L.W. 3241 (U.S. Oct. 1, 1984), we held a tax component to be inappropriate in an age discrimination case. That case involved different circumstances than the case at bar; additionally, an important factor in that decision was the liquidated damages provision of 29 U.S.C. § 216(b), providing for an

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[1] We offer no opinion as to whether separate subclass representatives would have been appropriate in this case.

automatic doubling of the back pay award to make up, in part, for the delays in receipt of payment. We believe the trial court's inclusion of the tax component was an appropriate exercise of its discretion in the instant case.

AFFIRMED.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4963

Joe Vernon Sears, an individual,
in person, and for all other persons
similarly situated,
Plaintiff,

v.

The Atchison, Topeka and Santa Fe
Railway Company;

and

United Transportation Union, successor
to Brotherhood of Railway Trainmen,
a labor organization,
Defendants.

### ORDER APPROVING COMPROMISE AND DISMISSAL OF BACK PAY AND ATTORNEY'S FEES CLAIM AGAINST DEFENDANT AND ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Filed Sept. 8, 1975

Now on this 8 day of September, 1975, this matter comes on for hearing before the Court in accordance with the previous Orders of the Court setting hearings on the approval or rejection of the proposed compromise and settlement agreement between Plaintiff Joe Vernon Sears, an individual, in person, and for all other persons similarly situated, (hereinafter referred to as "Plaintiff"), and Defendant the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as "Santa Fe") relating to the Plaintiff's claim on behalf of himself and other members of the class for back pay and attorney's fees against

the Santa Fe. At the hearing held on September 3, 1975, Plaintiff appeared by his counsel, Terry G. Paup; Defendant Santa Fe appeared by its counsel, Thomas R. Conklin; Defendant United Transportation Union appeared by its counsel, William C. Maier and Richard R. Barnes; and five (5) members of the class, Criscell Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour, appeared by their counsel, Richard L. Butler, Hillord H. Hinson and Arden P. Miller.

After hearing arguments and being fully advised in the premises, the Court continued the hearing to September 8, 1975.

WHEREUPON, the Court, after reviewing the files, hearing the arguments and statements of counsel, and being fully advised in the premises, finds and determines that notice as heretofore ordered by the Court was duly mailed to all members of the class, including those class members not receiving any payment, and that such method of notification was the most reasonable and practicable way of giving notice and that no further notice is required.

WHEREUPON, the Court, based upon the Court's files and the records therein contained, finds that the total amount of the settlement agreement as filed herein is now $110,750 due to the fact that five (5) members of the class have taken exceptions, and the Court finds that the settlement agreement as fully set forth in Appendix "A" and Appendix "B" attached hereto and made a part hereof, is reasonable and in the best interest of the Plaintiff and all members of the class except the five (5) class members who have taken exception.

WHEREUPON, the Court finds that all federal and state income taxes and taxes required by the Railroad Retirement Act and other lawful payroll deductions must be deducted by the Santa Fe from the payments to be made to the Plaintiff and other members of the class.

WHEREUPON, the Court finds that the fact that all Santa Fe Train Porters who retired, became disability annuitants, or died prior to May 1, 1972, do not receive any payment is proper and lawful.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

(1) That the settlement agreement as set forth in Appendix "A" and Appendix "B" attached hereto and made a part hereof is in all respects approved and ratified by the Court.

(2) That the payments reflected on Appendix "A" attached hereto and made a part hereof to be made to the Plaintiff and other members of the class are subject to the deduction by Santa Fe of all federal and state income taxes and taxes required by the Railroad Retirement Act and other lawful payroll deductions.

(3) That Defendant Santa Fe shall pay to the Plaintiff and other members of the class the amounts reflected on Appendix "A" attached hereto and made a part hereof, subject to the deductions mentioned in (2) above, provided that such payment is to be made as Plaintiff and each member of the class listed on Appendix "A" file notarized claims as provided in the Notice forwarded to Plaintiff and all members of the class.

(4) That the fact that all Santa Fe Train Porters who retired, became disability annuitants or died prior to May 1, 1972, do not receive any payment is proper and lawful and is approved by the Court.

(5) That Thomas R. Conklin, attorney for Defendant Santa Fe, shall file with the Court an itemized statement of the disbursements made to the Plaintiff and the other members of the class within five days following November 1, 1975.

(6) That the attorney's fees set forth in Appendix "B" attached hereto and made a part hereof are approved and ratified by the Court.

(7) That this settlement does not affect the rights of the five class members who have taken exceptions, who are Criscell Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour.

(8) That the Santa Fe, upon compliance with (3) above, is released and discharged from any and all claims and liabilities to the Plaintiff and the other members of the class, except the five members listed in (7) above, for back pay relief and attorney's fees under or pursuant to Title VII of the Civil Rights Act of 1965, as amended, (42 U.S.C.A. Sec. 2000e, et seq.).

(9) That this Order does not affect the liability issue of the United Transportation Union for back pay relief and attorney's fees under or pursuant to Title VII of the Civil Rights Act of 1965, as amended, (42 U.S.C.A. Sec. 2000e, et seq.).

Dated at Wichita, Kansas, this 8 day of September, 1975.

/s/ WESLEY E. BROWN
Chief Judge

APPROVED:

/s/ Terry G. Paup, Attorney for
Plaintiff and other members
of the class.

/s/ Arden P. Miller

the class: Criscell Kemp,
A. M. Bennett, A. L. Woolfolk,
T. C. Luckey, and W. W. Seymour.

/s/ Thomas R. Conklin
Attorney for Defendant The
Atchison, Topeka and Santa Fe
Railway Company.

United States District Court,
D. Kansas.

Civ. A. No. W-4963.

Joe Vernon SEARS, an Individual, in person and for all other persons similarly situated,

Plaintiffs,

v.

The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, and United Transportation Union, a successor to Brotherhood of Railway Trainmen, a labor organization,

Defendants.

June 14, 1978

## MEMORANDUM OF DECISION

WESLEY E. BROWN, District Judge.

## BACKGROUND

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII or the Act]. Plaintiffs and class members[1] charge The Atchison, Topeka and Santa Fe

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[1] The action was intitially filed by Joe Vernon Sears as a class action. The Court ordered that Criscell Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour be permitted to intervene on September 3, 1975. On December 16, 1975, the Court granted leave to intervene as named party plaintiffs to Albert L. Bennett, C. J. Skelton, Archie N. Jones, Forrest P. Tollett, John W. Landrum, Lawson C. Spencer, Thomas H. White, Earlie Nash, Aubrey A. Robinson, Edward Rawlins, John W. Cole, Charles Majors, Jr., Jessie J. Smith, Paul H. Stewart, Jimmy E. Brown, Carl E. Chester, Raymond Wiley, Elgie Crow, Ellis Johnson, and Ray E. Landrum.

Railway [Santa Fe] and the United Transportation Union [UTU], successor to the Brotherhood of Railway Trainmen [BRT] and the Order of Railway Conductors and Brakemen [ORC&B], with having engaged in a policy and practice of discrimination on account of race in their dealings with plaintiffs and other black train porters employed by Santa Fe, in violation of Title VII.

The plaintiffs are black male Americans who at any time were employed by Santa Fe as train porters, also known as porter-brakemen, and who have been employed by Santa Fe, in any capacity, during the period from July 2, 1965, to the present. The Brotherhood of Sleeping Car Porters [BSCP], an unincorporated labor association ceertified to represent train porters since April 5, 1946, is also a party plaintiff. The BSCP was merged with the "System Division" of The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees [BRAC], effective April 1, 1978. Because of the merger, the appropriate division of BRAC is a party plaintiff, but all relevant actions were taken by the BSCP, and any judgment rendered by this Court will be as to the BSCP, subject to later action if necessary.

The defendant Santa Fe is a Delaware corporation which conducts interstate transportation by railroad. Santa Fe rail lines extend from Chicago, Illinois, west to San Francisco, California, and south to Houston, Texas.[2] At all times material, Santa Fe was organized for operating purposes into three subdivisions: Eastern Lines, operating in Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, and New Mexico; Western Lines, operating in Kansas, Oklahoma, Texas, Louisiana, and New Mexico; and Coast Lines, operating in New Mexico, Arizona, and California.

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[2] For the purposes and issues herein, the Gulf, Colorado and Santa Fe Company and the Panhandle and Santa Fe Railroad Company, both separate corporations, were part of the Santa Fe. Both of these corporations were merged into the Santa Fe on August 1, 1965.

The UTU is an unincorporated labor union consisting of an International union, local unions, and intermediate bodies. The UTU or its predecessors, BRT and ORC&B, are and have been the certified bargaining representatives for brakemen and conductors since the 1920's. The BRT and ORC&B merged into the UTU, effective January 1, 1969. The UTU and its predecessors, BRT and ORC&B, have represented, in labor matters, some members of the crafts of brakemen and conductors since 1868. From 1868 until 1966 the Santa Fe was an "open shop" employer and membership in a union was not a condition of employment. Since 1966, the Santa Fe has been a "union shop" employer and membership in a union, certified to represent the employee craft by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, is required within thirty days of employment. The parties have stipulated that the UTU is capable of being sued and is properly being sued in this action.

Plaintiff Joe Vernon Sears filed a Complaint against Santa Fe and UTU with the Kansas Commission on Civil Rights [KCCR] on March 8, 1966, alleging that Santa Fe and UTU had denied and were denying him and other Santa Fe train porters their rights under Title VII by reason of race. Sears filed a Complaint with the Equal Employment Opportunity Commission [EEOC] on October 4, 1966, setting forth the same charges as brought before the KCCR, and the EEOC asserted jurisdiction over Sears' complaint. On October 7, 1972, Sears was notified by the EEOC that he was entitled to file suit against defendants under Title VII. Several other plaintiffs also filed Complaints with the EEOC and were notified of their right to sue. The parties have stipulated that the jurisdictional requirements to bring suit under Title VII have been satisfied by plaintiffs and class members, and that venue is proper in this district.

On August 4, 1975, the Court entered an Order pursuant to Rule 23, Fed.R.Civ.P., that this action is maintainable as a class action under Rule 23(b)(2), on behalf of a class composed of the plaintiffs and all other black train porters employed by Santa

Fe, in any capacity, during the period from July 2, 1965, to the present. Thereafter, on September 8, 1976, the Court, following notice to all class members, entered an Order Approving Compromise and Dismisal of Back Pay and Attorneys' Fees Claim Against Defendant Santa Fe, with respect to plaintiffs and class members except Criscell Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour. On December 29, 1976, January 3, 1977, and January 4, 1977, plaintiffs Kemp, Bennett, Woolfolk, Luckey, and Seymour each entered into Covenants Not to Sue with Santa Fe, and compromised and dismissed their respective back pay and attorneys' fees claims against Santa Fe. As a result, all plaintiffs and class members have compromised and settled their back pay and attorneys' fees claims with defendants Santa Fe.

On January 16, 1978, the BSCP was joined as a party plaintiff. Trial of this matter was had to the Court by means of a joint presentation of stipulated facts, subject to ogjections of relevancy and materiality, filed February 8, 1978. In connection with this presentation, each party also filed numerous exhibits. Memorandum briefs and reply briefs were subsequently filed by each party. The record before the Court is complete. The parties are agreed that this action will be bifurcated into a liability and a damage stage, the latter to follow only if liability is found. We now turn our attention to the question of the liability of defendants.

## THE ISSUES

Plaintiffs contend that the Santa Fe, and UTU, and the UTU's predecessors have, for over three quarters of a century, engaged in a systematic campaign and practice of excluding blacks, and more particularly, black train porters, from employment as brakemen, conductors, and supervisory or management personnel with Santa Fe. Plaintiffs claim that they have suffered disparate treatment because Santa Fe denied employment opportunity to blacks by employing and retaining

blacks in the traditionally Negro crafts of train porter and chair car attendant. Plaintiffs also claim that the seniority systems for the relevant crafts, entered into and maintained through collective bargaining agreements between Santa Fe and the BRT and ORC&B, have had a discriminatory impact upon them by locking them into the crafts of train porter and chair car attendant. Plaintiffs contend that the result of the seniority system is to perpetuate the effects of prior discrimination, establishing a Title VII violation even though the actual discriminatory acts may have occurred before the effective date of Title VII [pre-Act]. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) [*Griggs*]. Plaintiffs contend that the seniority system is not bona fide within the meaning of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) [*Teamsters*]. In part, plaintiffs assert that the seniority system is not bona fide under Title VII because of the defendant unions' failure to eradicate discrimination, alleging that the unions had a duty to plaintiffs to eradicate discrimination against them. Plaintiffs further contend that their rights should be governed by Title VII rather than the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, so that defendants cannot defend their conduct by asserting that such conduct was immunized by the Railway Labor Act. Plaintiffs seek equitable and injunctive relief against Santa Fe and UTU whereunder the plaintiffs and all class members are granted seniority rights as brakemen and conductors retroactive to July 2, 1965, the effective date of Title VII. In addition, plaintiffs seek to recover from the UTU, on behalf of themselves and all other class members, an award of back pay and their reasonable attorneys' fees and costs incurred herein. It is stipulated that plaintiffs have settled all damage and attorneys' fees claims with the Santa Fe.

Both Santa Fe and the UTU contend that plaintiffs have failed to make out a case of discrimination. Defendants assert that the discriminatory conduct, if any, was in hiring plaintiffs as chair car attendants and train porters rather than as brakemen,

acts which were done before the effective date of Title VII, and that under the doctrine of *United Airlines Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) [*Evans*], the effect of discriminatory hiring is not a continuing violation past the effective date of the Act. In the alternative, defendants claim that even if plantiffs have established racial discrimination perpetuated into the period covered by Title VII by a seniority system, the seniority system is bona fide pursuant to § 703(h) of Title VII and *Teamsters,* and therefore there can be no violation of Title VII.

Santa Fe contends that it in no way discriminated against plaintiffs in violation of Title VII, either pre-Act or post-Act. The railroad asserts that under § 703(j) of the Act, it is not required to grant preferential treatment to a group because of race. Santa Fe contends that it is bound by the provisions of the Railway Labor Act. Accordingly, Santa Fe states that it must recognize, for collective bargaining purposes, the UTU and its predecessors as the union certified to represent brakemen and conductors, and the BSCP as the union certified to represent train porters and chair car attendants. Furthermore, Santa Fe contends that it is bound by decisions rendered under and in accordance with the Railway Laobr Act. Santa Fe contends that it has no right to unilaterally transfer employees under the Railway Labor Act, and points out that plaintiffs' certified representative, the BSCP, objected to the alleged offering of jobs in other crafts by the Santa Fe to employees represented by the BSCP, after the effective date of the Act. Santa Fe contends that post-Act statistics offered by plaintiff are of little evidentiary value, and fail to make out a prima facie case of post-Act discrimination.

The UTU joins Santa Fe in asserting that the statistical evidence submitted by plaintiffs fails to show discrimination against the plaintiff class. On its own behalf, UTU contends that it is and its predecessors were prohibited by the Railway Labor Act from representing the plaintiff class because they

were represented by the BSCP, and that the UTU had no duty to plaintiffs to attempt to eradicate alleged discrimination against them. UTU asserts that BSCP, as plaintiffs' certified bargaining representative, could have worked on plaintiffs' behalf. UTU contends that Santa Fe has exclusive hiring and promotion authority, and that the UTU is not liable or responsible for any acts Santa Fe may have done pursuant to that authority. The UTU asserts taht it and its predecessors were certified to represent brakemen and conductors, and actions on behalf of these crafts were not discriminatory, but were within the framework of the Railway Labor Act.

The defendants deny that plaintiffs are entitled to relief. They contend that plaintiffs and class members, even in the absence of any discrimination, should such discrimination be found, would not have obtained better paying positions by reason of their lack of qualifications and are therefore precluded individually from receiving monetary relief. Defendants further contend, in the event that seniority is awarded plaintiffs, that the rights of white brakemen and conductors should be taken into account. The question of relief, of course, is for the second stage of this action, and is not before the Court at this time.

## THE FACTS

The stipulated facts are by reference made a part of the decision. We summarize those relevant facts which are necessary to an understanding of the views expressed herein.

The operation of trains by Santa Fe and other railroads requires the performance of braking duties. These duties include the inspection of the train cars, the testing of signals and brake apparatus for the safety of train movement, the use of hand and lamp signals for the protection and movement of trains, opening and closing switches, coupling and uncoupling cars and engines and the hose and chain attachments thereof, the comparison of watches when required by the rules of the company, reporting to and receiving instructions from the train master,

and while on duty, being under the direction of the conductor and performing such other braking duties as may be necessary.

Historically, the Santa Fe train runs include passenger trains, through freight trains, local freights, and mixed passenger and freight trains. Traditionally, the train crew on local and through freight trains consisted of a conductor, head-end brakeman, rear-end brakeman, engineer and fireman. Train porters were not employed on freight trains. The train crew on passenger trains traditionally consisted of a conductor, a train porter or head-end brakeman, a rear-end brakeman, a fireman, and engineer. Arizona and California, in the Coast Lines subdivision, and Texas, had at one time full crew laws. These laws required that two brakemen be employed. As a result, train porters did not work in Arizona and California. Full crew law requirements were abolished by 1964.

After 1944, except in full crew law states, Santa Fe phased out train porters or headend brakemen on passenger trains, accomplishing this through attrition and the reduction of passenger service. After 1964, Santa Fe phased out head-end brakemen in the full crew law states, except where labor agreements dictated otherwise. Head-end braking functions were assumed by other members of the operational crew after being phased away from brakemen and train porters. The last train porter on the Santa Fe last worked in July 1975.[3] Those plaintiffs who are still active with the railroad work in capacities other than train porter. Effective May 1, 1971, the Santa Fe discontinued passenger trains and Amtrak took over passenger service.

A head-end brakeman or a train porter on a passenger train performed the same duties. These were:

(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

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[3] Joe Vernon Sears, the last train porter with the Santa Fe, retired in August 1975.

(b) Use hand and lamp signals for the protection and movement of trains.

(c) Open and close switches.

(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

(e) Compare watches when required by rule.[4]

These employees also assisted the conductor and performed work directed and supervised by the conductor.

A train porter on a passenger train performed additional duties, attending to passengers in the first car and the interior condition of the car. A train porter wore a uniform. Train porters and head-end and rear-end brakemen on passenger trains received the same mileage rate or hourly rate from 1918 until termination of the job of train porter in 1975. However, the brakemen on passenger trains received additional compensation such as pay in connection with delays not paid to a train porter. The total wages to a brakeman on a passenger train were higher than the total wages paid to a train porter on a passenger train. Brakeman rate of pay varied by type of train.

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[4] These duties were described in this manner in Supplement No. 12 to General Order 27, issued by the District General of Railroads on December 2, 1918. General Order 27 also provided:

> Effective June 1, 1918, colored men employed as firemen, trainmen and switchmen shall be paid the same rate of wages as are paid white men in the same category.

Supplement No. 12 to General Order 27 also provided;

2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

3. This order shall not curtail the duties of employees heretofore classed as "train porters."

4. This order shall not infringe upon the seniority rights of white brakemen.

Most passenger trains also carried chair car attendants. Chair car attendants are non-operational personnel, and do not perform any braking duties. The duties of a chair car attendant include attending to the passengers in a given train car or cars and to the condition of the interior of the car or cars. He works passenger trains only.

Brakemen had additional duties on non-passenger train runs. On local freight trains, a brakeman's duties included in specting the consist of the train (i.e., the arrangement or alignment of freight cars on a freight train in accordance with operating procedures and safety regulations), adjusting the consist of the train, walking alongside the train for inspection at stops, dropping off empty and full freight cars for customers, picking up empty and full freight cars from customers, respotting cars, and repairing cars dropped off by through freight trains. Uniforms were not required or worn by local freight brakemen since the work and equipment soiled any clothing worn. The duties of a brakeman on a through freight train were substantially similar to those on a local freight train.

A yardman or switchman works within a specific geographic area, the train yard. A yardman switches freight and passenger equipment, transfers freight and passenger equipment, and handles construciton and maintenance of way trains and work trains operating in the yardman's territory. On May 30, 1960, the seniority lists of yardmen and brakemen were dualized on the Santa Fe. After May 30, 1960, to the present time, a new hire generally starts work in the yard moving cars, switching, performing minor car repairs and other railroad yard work. After gaining sufficient seniority the yardman can move to the freight extra board protecting local and freight brakeman service and then passenger services (now discontinued), if seniority permits and the brakeman is qualified and so desires.

The conductor of a freight or passenger train had the ultimate responsiblity for the operation of a train, pursuant to the operating rules of the Santa Fe and train orders.

A flagman performs flagman functions and rear-end braking on a passenger train.

The term "trainmen" is generally understood to mean freight and passenger brakemen, flagmen, train baggagemen, and brakemen baggagemen.

Railroad crafts or classes are denominated by the National Mediation Board,[5] which designated employees of a carrier according to traditional work functions who are generally organized with a certified representative to make and maintain agreements with the carrier under the Railway Labor Act. This law suit is concerned with the crafts of train porter, brakeman, conductor, and tangentially chair car attendant insofar as many plaintiffs and class members have served as chair car attendants with the Santa Fe. The ORC&B was certified to represent the conductors on the Santa Fe in 1926. The BRT was certified to represent the brakemen on the Santa Fe in 1926. The BSCP was certified to represent the train porters and chair car attendants in separate proceedings on April 5, 1946. From and after the dates of the above respective certifications, the conductors, brakemen and train porters and chair car attendants were recognized as separate crafts under the Railway Labor Act. The crafts were recognized by the federal government in General Order 27 in 1918 (*See* note 4).

The position of train porter was created by the Santa Fe on or about March 1, 1899. Train porter positions have always been filled by black males. In most instances between the dates of

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[5] The National Mediation Board is an independent agency in the executive branch of government established by the Railway Labor Act, and is known as the Mediation Board. Parties or either party to a dispute between employees and carrier concerning changes in rates of pay, rules, or working conditions, or any other dispute not referable to the National Railway Adjustment Board may invoke the services of the Mediation Board. The National Railway Adjustment Board, also known as the Adjustment Board, is divided into fourt divisions with jurisdiction over disputes involving employee crafts within that division.

1918 and 1959,[6] the entry level job with the Santa Fe for a black man was the position of chair car attendant. Chair car attendants could qualify for, and be promoted to, the position of a train porter upon taking a Rules Examination, completing student trips on passenger trains, and satisfactorily passing a physical examination. The Rules Examination was both written and oral, and the written portion thereof consisted of an open book test containing questions concerning the Santa Fe operating Book of Rules. This examination was not a test which was failed or passed, and was used by the Santa Fe as a learning process to familiarize the applicant with the Santa Fe operating rules. Likewise, the later oral examination was administered for the purpose of determining whether the applicant understood the Santa Fe Book of Rules and to clear up any misunderstanding he might have with respect to them. The Rules Examination was given by the trainmaster at the location of the application. Upon satisfactory completion of the Rules Examination, student trips and physical examination, a black chair car attendant was promoted to the position of train porter and was thereafter qualified to perform front end braking duties on passenger trains. Also, in certin instances, the Santa Fe would directly hire a black man as a train porter, and on other occasions train porters were hired by the Santa Fe from other jobs. There was no requirement that a chair car attendant proceed in a timely manner to the craft of train porter or else lose his job with the Santa Fe.

The Santa Fe has, at all times, maintained seniority districts within the operating divisions for each craft. The seniority district is a certain geographic area and within the district a published seniority roster is maintained. The seniority roster carried an individual's seniority date, which is the earliest date

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[6] After 1959, the Santa Fe was prohibited from hiring a new man to the job of train porter because of the ruling in Award 19324, discussed *infra*.

of continuous service on the Santa Fe, in a given craft. Seniority in craft determines the right to protect work within the craft (within the seniority district), to obtain regular runs, order of furlough and recall, as well as other employment rights. Seniority is not transferable from one seniority district to another, nor is it transferable from one craft to another craft.

Seniority as a chair car attendant began as of the date the man first went to work as a chair car attendant. The seniority date on a Santa Fe train porter's seniority roster was the date a man first became qualified as a train porter. A train porter continued to accumulate seniority on a chair car attendant's roster after he began working as a train porter, in addition to his trian porter seniority. At all times, and within the various seniority districts for chair car attendants and train porters, two separate seniority rosters were maintained with one being for train porters and the other being for chair car attendants. On May 1, 1950, the BSCP and Santa Fe executed a collective bargaining contract for chair car attendants which set forth seniority provisions for chair car attendants. Prior to this time, the seniority system for chair car attendants had been maintained by Santa Fe on the basis of custom and practice. There has never been a written collective bargaining agreement covering seniority for train porters, although the Santa Fe and the BSCP did enter into written contracts concerning rates of pay, vacations, and prescribed uniforms for the train porters. The seniority system for Santa Fe train porters was established through custom, practice, published seniority rosters, and recognized by the Train Service Board and National Railway Adjustment Board (successor to the Train Service Board) decisions during the years the Santa Fe employed train porters, and was based upon time and service on the Santa Fe in a train porter's seniority district.[7]

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[7] It is the testimony of plaintiff Arthur L. Woolfolk, who was active in the union affoars of the BSCP, that Santa Fe always took the position with the BSCP that Santa Fe did not want to negotiate a contract for the train porters until the "Hunter Litigation," which culminated in Award 19324, was finally terminated or resolved.

A chair car attendant started working off of the chair car attendant's extra board[8] until he had sufficient seniority to bid for an advertised regular job on a passenger train in his seniority district. After becoming a train porter, he would continue to work as a chair car attendant and off of the train porter's extra board, protecting against temporary vacancies in train porter positions. After accumulating sufficient seniority, he could likewise obtain a regular job as a train porter on a Santa Fe passenger train.

A non-black man desiring to be a brakeman qualified for that position with the Santa Fe upon taking a Rules Examination, completing student trips on local freight trains, and by satisfactorily passing a physical examination. The Rules Examination for a brakeman applicant and the administration thereof was the same as for train porters. Upon satisfactory completion of the Rules Examination, student trips and physical examination, the applicant was employed by the Santa Fe as a brakeman qualified to perform braking duties on the Santa Fe. Generally, prior to 1971, although the requirement varied from time to time, the Santa Fe required a high school education as a qualification for an applicant to the position of brakeman. This requirement was eliminated in 1971 by the Santa Fe. From 1918 until July 2, 1965, with the exception of the Silsbee, Texas Seniority District,[9] front-end and rear-end braking duties on

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[8] Working off the extra board generally meant that the employee was available for call to temporarily take the place of an employee who did hold a regular job, but who was absent for reason of illness, vacation or otherwise. The employee called off the extra board would be protecting the job or work for which he was called. When vacancies occurred in regularly held or full-time jobs, the jobs would be "advertised" for bid by Santa Fe, usually through a bulletin, and the employee with the most seniority who bid pursuant to the advertisement got the job.

[9] The Silsbee, Texas Seniority District has been something of an anomaly in the history of the Santa Fe, for black rather than white males have been predominantly employed as brakemen in that district.

Santa Fe freight trains were performed exclusively by non-black males employed by the Santa Fe as brakemen. The seniority system for Santa Fe brakemen mandated the promotion of a stated number of brakemen to the position of conductor on the basis of seniority, and only after they had had at least two years experience in the freight service. Promotion from brakeman to conductor was mandatory if the employee was to stay in service. Brakemen took a qualifying examination as a prerequisite to becoming a conductor. On July 2, 1965, the effective date of Title VII, except in the Silsbee District the Santa Fe did not employ a single black conductor. There were no black conductors outside the Silsbee District until 1970.

A brakeman's seniority began as of the date the man first started to work as a brakeman or, after the dualization of the yardmen and brakemen's seniority system in 1960, the date he first started to work as a Santa Fe switchman-brakeman. The seniority date on a Santa Fe conductor's seniority roster was determined as of the date a man was promoted to, or hired as, a Santa Fe conductor. Within the seniority districts separate seniority rosters were maintained for brakemen and conductors.

Under the seniority system for Santa Fe brakemen, prior to 1960, a new hire normally started protecting all extra services for which he qualified, which could be local freight, through freight, mixed trains, passenger trains, road switchers and work trains. After accumulating sufficient seniority the brakeman could obtain regular braking jobs on through freight trains. Generally a brakeman needed substantial seniority to obtain a regular braking job on passenger trains. Some brakemen never

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There were 55 black brakemen in the Silsbee District as of the effective date of Title VII. However, there were apparently no black conductors in the Silsbee District as of the effective date of the Act. It is the testimony of Fred Douglas Woodberry, who has been employed in the Silsbee District as brakeman, conductor, and engine foreman, that from July 22, 1940 until September, 1965, there were no black conductors in the Silsbee District. Statistics indicate that as of 1965, there were four black conductors in the Silsbee District.

sought braking work on passenger trains; and once a brakeman obtained a regular position as a brakeman on a passenger train, he could also return to freight service by exercising his seniority rights. In 1960 and thereafter, after the seniority systems of yardmen and brakemen were dualized, a new hire seeking a job as brakeman would generally start on the extra board for yardmen, performing switching work. With sufficient seniority, a switchman-yardman could obtain a regular position in the Santa Fe, and as the extra board for Santa Fe brakemen required more men, he could obtain a position on the brakeman's extra board on the basis of his seniority. He could then proceed as a brakeman as outlined above.

The seniority system for brakemen and conductors was established under collective bargaining contracts negotiated by the BRT and ORC&B with the Santa Fe. From prior to 1892 until merged into the UTU on January 1, 1969, the BRT and ORC&B were separate labor unions; both unions represented the crafts of brakemen and conductors from before 1892 until the merger; both unions were certified to represent their respective craft of brakeman and conductor on the Santa Fe in 1926. The first known contract containing seniority provisions was an agreement executed on April 1, 1892, by the Santa Fe and the BRT and the Order of Railway Conductors, predecessor to the ORC&B. Thereafter, according to all evidence before this Court, separate contracts were negotiated by the BRT and the ORC&B with Santa Fe, and those contracts likewise contained seniority provisions for brakemen and conductors respectively. The evidence includes seniority provisions from Santa Fe's Schedule of Rates, Rules and Regulations for Trainmen dated 1904, 1907, 1910, 1917, 1923, 1928, 1940, 1943, 1948, 1956, 1964 and 1966. At all times, an employee's seniority date in a craft began when he first worked in or was promoted to that craft, and position on a seniority roster determined the type of work and promotion opportunities an employee could attain.

In 1883 the BRT established its first Constitution. Membership requirements were: male, sober, industrious and employed

as a brakeman by a railroad. By 1939, the BRT Constitution provided that a candidate for membership shall have been employed as a railroad trainman for at least one month prior to application for admission and shall be white, male, sober, industrious and join of his own free will. The evidence before the Court does not disclose, and the parties do not know, if the 1939 requirement that a BRT member be white was in existence before 1939. The requirement that a member be white was retained by the BRT until 1960. The first known Constitution of the ORC&B is dated May 7, 1934, and requires for membership: any white male who had qualified as a train or yard conductor and had at least six months experience in road or yard service at the time of application. The requirement that a member be white was retained by the ORC&B until 1966. The UTU, successor to the BRT and the ORC&B, provides in its 1975 Constitution that any person of good moral character employed in a craft represented by the UTU is eligible to membership.

Hiring and promoting employees is a retained right of management of the Santa Fe, and unions are not authorized to make these decisions.

The certified bargaining representatives of brakemen have acted throughout the history of the railroad to ensure that braking duties are performed by its members. Beginning not later than 1920, the BRT made several attempts to transfer braking duties from black train porters to white brakemen. These attempts took the form of letter requests, demands, legislative lobbying, proceedings before the Train Service Board of Adjustment, the National Railroad Adjustment Board, First Division and were also the subject of litigation in the federal courts. It appears from the evidence that BRT had no black members, nor Santa Fe black brakemen or conductors, at any time when these attempts were made. The BRT was ultimately successful. In Award 19324, issued October 14, 1959, the National Railroad Adjustment Board, First Division, held that only those train porters holding a seniority date prior to April 20, 1942, could

perform front-end braking as a part of their duties. All train porters who had a seniority date subsequent to April 20, 1942, were demoted to chair car attendants and could no longer work as train porters.

The main thrust of the BRT protests was that contracts between the BRT and the Santa Fe provided for the seniority rights and duties of brakemen, that on passenger trains the duties of head-end brakemen were being performed by train porters, and that the train porters were not on the brakemen's seniority roster. This protest can be seen in a number of incidences. The General Chairman for the BRT, S. R. Harvey, sent a letter, September 30, 1920, to the Santa Fe's Eastern and Western Line General Managers complaining of the use of train porters; the Santa Fe responded that it would not replace train porters with brakemen because the train porters performed additional duties which would be distasteful to the brakemen. The BRT protested the use of train porters in Case No. 2167 to the Train Service Board for the Western Region in June, 1926; in Award 2126, the protest was denied. The BRT protested the use of train porters in Case No. 2359 to the Train Service Board in November, 1926; in Award 2336, the protest was denied. The General Chairman for the BRT, H. W. Gross, sent a series of letters to the Santa Fe in 1932, proposing negotiations for the consolidation of the seniority of brakemen and train porters on all divisions of Santa Fe's Eastern and Western Lines; the Santa Fe responded that it would not negotiate such a consolidation because the BRT did not represent the train porters and because the request of the BRT amounted to nothing more than a restatement of the protests previously filed with the Train Service Board. The BRT filed a protest in 1939 with the National Railroad Adjustment Board, First Division, Docket 7400; this protest ultimately resulted in Award No. 19324. On April 20, 1942, the National Railroad Adjustment Board, First Division, sustained the protest filed by the BRT and in Award 6640 ruled that the front-end braking duties on Santa Fe passenger trains should be performed by brakemen holding seniority as such on

the Santa Fe brakemen's seniority roster. Award 6640 was challenged in a series of cases known as the "Hunter Litigation," brought in the United States District Court for the Northern District of Illinois, Eastern Division. The court entered a temporary injunction against the enforcement of Award 6640 on the theory that the train porters did not receive notice of the proceedings. *Hunter v. Atchison, T. & S. F. Ry. Co.*, 78 F.Supp. 984 (N.D.Ill. 1948), *aff'd* 171 F.2d 594 (7th Cir. 1948). A permanent injunction was then entered by the trial court. This was reversed by the Seventh Circuit on the basis that the trial court should have heard evidence on the issue of whether the train porters, as a class, had actual notice of the prior proceedings before the National Railroad Adjustment Board, even though they had not received formal notice. *Hunter v. Atchison, T. & S. R. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951). On August 8, 1958, the trial court remanded the case to the National Railway Adjustment Board. On October 14, 1959, the Board ruled in favor of the BRT in Award 19324, holding that only those train porters with a seniority date prior to April 20, 1942, the date of Award 6640, could continue to work as train porters. Since 1956, approximately three years prior to Award 19324, the Santa Fe had not hired or promoted any person to the position of train porter. Pursuant to the Railway Labor Act, the Santa Fe was bound by Award 19324 and therefore demoted to chair car attendant all persons with a train porter seniority date subsequent to April 20, 1942.[10]

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[10] Of the plaintiffs and class members listed in the pretrial order, the following men had a train porter seniority date prior to April 20, 1942: Joe Vernon Sears, Edward Rawlins, Theodore Butler, Luther Prince, Oscar Alfred Walker, William D. Christopher, Archie N. Jones, Forrest P. Tollett, Earlie Nash, William H. Cheers, Robert H. Garner, Jr., George Guest, Obie F. Hunter, James P. Jackson, Frank C. Knighton, Herbert C. Knighton, Marion R. Mitchell, Sherwood Moore, Cecil M. Robinson, Vaughn H. Smith, Baylon K. Thaw, Ray O. Wagner, C. B. Williams, G. L. Williams, Wilborn Williams and Offie Wimberly. The following men had a train porter seniority date

The Court notes that there were other efforts by the BRT on behalf of brakemen, involving other railways, to assume braking duties performed by train porters on passenger trains.[11]

We turn now to events occurring after the effective date of Title VII. On February 7, 1965, railroads which included the Santa Fe, represented by the National Railway Labor Conference, and five unions comprising the Employee's National Conference Committee (not including the BSCP, BRT, or ORC&B) executed a mediation agreement in Case No. A-7128. This agreement is commonly referred to as the "Feb. 7 Agreement." A year later on February 8, 1966, the BSCP and the Santa Fe executed an agreement extending the Feb. 7 Agreement, along with agreed-upon interpretations thereof, to plaintiffs and class members, effective February 8, 1966. Those plaintiffs and class

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subsequent to April 20, 1942: Albert L. Bennett, Jimmie E. Brown, Bobbie Charles Papin, C. J. Skelton, T. J. White, Elgie Crow, Ellis Johnson, Obie Wright, Thomas H. White, Samuel Marvin Talbert, Jr., John W. Landrum, Lawson C. Spencer, Aubrey A. Robinson, John W. Cole, Charles A. Majors, Jr., Jessie J. Smith, Paul H. Stewart, Carl E. Chester, Raymond I. Wiley, Robert W. Austin, Willie Combs, Leon A. Finley, E. S. Garth, J. R. Garth, John S. Henry, Jr., Robert L. Hollowell, Herbert L. Jenkins, Eugene E. McGaugh, Leroy Preston, Pink Reynolds, Vernon M. Robinson, Levi E. Southall, William Steward and A. L. Woolfolk. Of the foregoing men, most are disability annuitants, retired, or deceased.

[11] See, e. g., the "Howard Litigation," *Howard v. Thompson,* 72 F.Supp. 695 (E.D.Mo. 1947); *Howard v. St. Louis-San Francisco Ry. Co.,* 191 F.2d 442 (8th Cir. 1951); *Brotherhood of Railway Trainmen v. Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); *Howard v. St. Louis-San Francisco Ry. Co.,* 215 F.2d 690 (8th Cir. 1954); and the "Randolph Litigation," *Randolph v. Missouri-Kansas-Texas Ry. Co.,* 68 F.Supp. 1007 (W.D. Mo. 1946); *Randolph v. Missouri-Kansas-Texas Ry. co., 7 F.R.D. 54 (W.D. Mo. 1947); Missouri-Kansas-Texas Ry. Co. v. Randolph,* 164 F.2d 4 (8th Cir. 1947); *Randolph v. Missouri-Kansas-Texas Ry. Co.,* 78 F.Supp. 727 (W.D.Mo. 1948); *Randolph v. Missouri-Kansas-Texas Ry. Co.,* 85 F.Supp. 846 (W.D.Mo. 1949); *Missouri-Kansas-Texas Ry. Co. v. Randolph,* 182 F.2d 996 (8th Cir. 1950); *Wood v. Randolph,* 209 F.2d 634 (8th Cir. 1954).

members that were covered by the agreement, by its terms, are "chair car attendants of this Company [Santa Fe] whose wages and working conditions are subject to the agreement between this Carrier and the Brotherhood of Sleeping Car Porters." The Feb. 7 agreement protects the employee until death, retirement, resignation, dismissal for cause in accordance with existing agreements, failure to retain or obtain a position available to him in the exercise of his seniority rights, or any period in which he occupies a position not subject to the working agreement. The Feb. 7 agreement established a base of wage protection for those protected employees. The protected employee is guaranteed a certain level of income even if furloughed or employed in a job normally paying a lower level of income. The Feb. 7 agreement also prohibits the Santa Fe from transferring protected employee from his craft or class to another craft or class on the Santa Fe.

On at least one occasion the BSCP took steps to ensure that Santa Fe followed the Feb. 7 agreement. In a letter dated November 16, 1967, Vice President of the BSCP, T. D. McNeal, objected to Santa Fe offering switchman and other positions to chair car attendants covered by the agreement. The Santa Fe responded by letter, December 19, 1967, that the employees in question had applied for employment as switchmen-brakemen, that they had not been approached by the Santa Fe to cross craft lines, and that they had voluntarily relinquished chair car attendant seniority to accept employment as switchmen-brakemen. The outcome of this correspondence was that the BSCP and Santa Fe negotiated a further agreement permitting Santa Fe to assign protected employees, if qualified, to other jobs on the Santa Fe, including but not limited to brakeman, switchman, fireman, or clerk. The employees so assigned would retain previously accumulated seniority as chair car attendants and therefore retain their status as protected employees under the Feb. 7 agreement. This extension of the Feb. 7 agreement was finalized between the BSCP and Santa Fe, March 23, 1971.

*Testimony of Individual Plaintiffs*

Several individual plaintiffs testified by summary of testimony. We note the following as common threads running through their testimony which are relevant to our enquiry:

Train porters and chair car attendants had the same annual physical examination as that given to brakemen and conductors.

A train porter's braking duties took priority over his clean-up duties; the clean-up duties were not performed when the braking duties required extra time.

Upon occasion, some train porters would assume the conductor's function when the conductor was drunk or otherwise unable to work, and would also on occasion be asked by a Train Master to watch over a new conductor while he was learning his duties. [Edward Rawlins, Luther Prince, William D. Christopher].

Plaintiffs and class members, all of whom have worked as train porters, feel and felt themselves qualified by their train porter experience to assume the duties of yardman or freight or passenger brakeman. Although non-passenger train brakemen had duties in addition to those of a passenger train porter, these additional brakemen duties were not difficult to learn, in the opinion of plaintiffs. Former train porters who became brakemen had no problem performing their duties as brakeman or brakeman-switchman due to their past experience and knowledge. [Jimmie E. Brown, Bobbie Charles Papin, Ellis Johnson, Samuel Marvin Talbert, Jr.].

Brakeman and conductor jobs were white jobs, while train porter and chair car attendant jobs were black jobs. As far as many plaintiffs and class members knew, the first black brakemen were Bobbie Charles Papin in 1968 and Leroy Beeson in 1969.[12]

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## EMPLOYMENT OF BRAKEMEN AND CONDUCTORS

| YEAR | ALL RACES | | | NEGRO | | | | | TOTALS LESS SILSBEE | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | EAST-ERN | WEST-ERN | TOTAL | EAST-ERN | WEST-ERN | TOTAL | PERCENT NEGRO | SB N.* | ALL RACE | NEGRO | PERCENT NEGRO |
| 1965 | 2469 | 2452 | 4921 | 0 | 56 | 56 | 1.1379 | 56 | 4865 | 0 | 0 |
| 1966 | 2478 | 2047 | 4525 | 0 | 65 | 65 | 1.4364 | 65 | 4460 | 0 | 0 |
| 1967 | 2478 | 2081 | 4559 | 0 | 74 | 74 | 1.6237 | 69 | 4490 | 5 | .1113 |
| 1968 | 2280 | 2136 | 4416 | 1 | 92 | 93 | 2.1059 | 76 | 4340 | 23 | 5299 |
| 1969 | 2373 | 2245 | 4618 | 7 | 109 | 116 | 2.5119 | 75 | 4543 | 31 | 6823 |
| 1970 | 2248 | 2145 | 4393 | 6 | 115 | 121 | 2.7543 | 82 | 4311 | 41 | .9510 |
| 1971 | 2814 | 2198 | 5012 | 11 | 121 | 132 | 2.6336 | 82 | 4930 | 50 | 1.0141 |
| 1972 | 2745 | 2115 | 4860 | 17 | 144 | 161 | 3.3127 | 79 | 4781 | 82 | 1.7151 |
| 1973 | 2861 | 2576 | 5437 | 48 | 212 | 260 | 4.7820 | 84 | 5353 | 186 | 3.4746 |
| 1974 | 2640 | 2522 | 5162 | 38 | 191 | 249 | 4.8237 | 84 | 5078 | 165 | 3.2493 |
| 1975 | 2361 | 2355 | 4716 | 65 | 183 | 248 | 5.2586 | 86 | 4630 | 162 | 3.4989 |
| 1976 | 2251 | 2198 | 4449 | 73 | 169 | 242 | 5.4394 | 89 | 4360 | 153 | 3.5091 |
| | | | | | CONDUCTORS | | | | | | |
| 1965 | 1061 | 1092 | 2153 | 0 | 4 | 4 | 1857 | 4 | 2149 | 0 | 0 |
| 1966 | 1072 | 956 | 2028 | 0 | 17 | 17 | .8382 | 17 | 2011 | 0 | 0 |
| 1967 | 1047 | 967 | 2014 | 0 | 27 | 27 | 1.3406 | 27 | 1987 | 0 | 0 |
| 1968 | 988 | 1062 | 2050 | 0 | 34 | 34 | 1.6585 | 34 | 2016 | 0 | 0 |
| 1969 | 1000 | 1213 | 2213 | 0 | 36 | 36 | 1.6267 | 36 | 2177 | 0 | 0 |
| 1970 | 1070 | 1236 | 2306 | 0 | 50 | 50 | 2.1682 | 48 | 2258 | 2 | .0885 |
| 1971 | 1020 | 1214 | 2234 | 0 | 57 | 57 | 2.5514 | 48 | 2186 | 9 | .4117 |
| 1972 | 1023 | 1239 | 2262 | 0 | 64 | 64 | 2.8293 | 54 | 2208 | 10 | .4529 |
| 1973 | 1031 | 1281 | 2312 | 0 | 65 | 65 | 2.8114 | 55 | 2257 | 10 | .4430 |
| 1974 | 1005 | 1514 | 2519 | 0 | 69 | 69 | 2.7391 | 55 | 2464 | 14 | .5681 |
| 1975 | 943 | 1530 | 2473 | 0 | 73 | 73 | 2.9518 | 56 | 2417 | 17 | .7033 |
| 1976 | 944 | 1472 | 2416 | 0 | 90 | 90 | 3.7251 | 63 | 2353 | 27 | 1.1474 |

Note: Data for 1973 were recorded in March; for all other years the month record is July.

There is expert testimony that in the regions from which the Santa Fe would probably draw its employees, black males would constitute 9.2% of the relevant labor market in 1965, defined as males 25 years of age or over with a high school education and up to three years of college. Defendants challenge this, and state that the Court should not consider any statistical evidence. They allege that the statistics offered by plaintiff as to employment of black brakemen and conductors on the Santa Fe are invalid under *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), stating that the proper group of employees to examine is the active class members rather than all black brakemen, that the black male population of the regions served by the railroad possessing a high school education is not the proper labor pool, and that the statistics are incomplete. A prima facie case of pattern or practice discrimination may or course be established by statistics alone. *Hazelwood, supra.* However, we do not rely on statistics to hold that plaintiffs have made out a prima facie case of discrimination. *See* text, *infra.* The Supreme Court has indicated that statistics come in infinite varie-

Some plaintiffs and class members applied for brakeman positions after the effective date of Title VII. Common experiences of these applicants were being told that the applicant was too old [T. J. White, Joe Vernon Sears, Oscar Alfred Walker], being told that the applicant would have to give up all previous seniority as train porter or chair car attendant and begin at the bottom of the brakeman seniority roster [C. J. Skelton, Sears, Walker], being told that Santa Fe was not taking applications [Elgie Crow, Thomas H. White], in an application made before Title VII being told that black men couldn't be brakemen [William D. Christopher], or being told that Award 19324 would not allow it [Crow] (Award 19324 was most commonly referred to, however, in connection with a chair car attendant's request to assume train porter duties). At least one plaintiff who was told he was too old for the position was subsequently asked by the Santa Fe to transfer to a brakeman position [T. J. White]. Other plaintiffs and class members testified that they did not apply for brakeman positions because they knew of these experiences of others and felt that there was no point in applying to be a brakeman [Talbert, Johnson, Thomas H. White]. Others refused to apply for or accept a brakeman position because they would have had to forfeit train porter and chair car attendant seniority [Sears, Rawlins, Skelton]. One plaintiff testified that after a Santa Fe official saw him looking at an equal opportunity poster which was posted in a Santa Fe office in 1967 or 1968, the poster was no longer on the wall. [Skelton].

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ty and that their usefulness depends on all of the surrounding facts and circumstances. *Teamsters,* 431 U.S. at 339, 97 S.Ct. at 1856, 52 L.Ed.2d at 418. We need accept neither plaintiffs' statistics nor defendants' challenges to those statistics to conclude, as we do, that for all the years before Title VII and for several years after Title VII, there were few or no black brakemen and conductors. The statistics merely indicate the point in time at which the railroad began employing blacks as brakemen and conductors, thereby buttressing plaintiffs' contention that they were not so employed until well after the effective date of Title VII, which in turn supports their contention that they were discriminated against on the basis of race.

During all periods in question, brakemen or switchmen-brakemen were regularly hired by Santa Fe and Santa Fe regularly promoted brakemen to conductor. These positions were always open even in periods of force reduction due to resignation, death, disability, or promotion of the Santa Fe brakemen or conductors.

Plaintiffs and class members are of the opinion that age would have been no bar to their employment as brakemen and conductors, for they were already experienced as brakemen, and white men as old as they or older were performing the duties of brakemen and conductors.

Certain plaintiffs and class members were either transferred by Santa Fe on its own initiative or after application by the respective employee to brakeman and other positions; these transfers generally taking place after 1971. [Johnson, T. J. White]. Bobbie Charles Papin was the first black brakeman on the Santa Fe Eastern Lines, and he was transferred on his own application in 1968 to the position of brakeman. Mr. Papin testified that he wore all white clothing to work his first day as switchman-brakeman, because he was afraid of the possibility he could be hurt if someone might "accidently" not see him.

During the 1940's and 1950's, Santa Fe filled some head-end braking positions with employees known as brakemen-baggagemen. These employees were white. Train porters could not bid for brakemen-baggagemen positions, nor could brakemen-baggagemen bid for train porter positions, although they performed the same braking duties.

A few plaintiffs and class members applied for membership in the BRT, feeling that such union membership would aid their quest to obtain brakeman positions. Of these, at least one, Edward Rawlins, was told that the BRT could not represent him as he was a train porter already represented by the BSCP. Elgie Crow was also refused BRT membership. However, one such attempt was successful. Luther Price applied for BRT member-

ship in 1964 and was accepted. The local BRT, through J. M. Phillips, General Chairman of the BRT, helped Prince protect his front-end braking position on Santa Fe passenger trains. Four other train porters were also accepted for BRT membership. In correspondence with Santa Fe, 1964-65, Mr. Phillips maintained the position that these five men were protected as trainmen by the BRT, although Santa Fe took the position that the BRT could not represent these train porters. The BRT prevailed, and in the 1968 agreement between the BRT and the Santa Fe, Schedule of Pay, Rules and Regulations governing Santa Fe trainmen, four of the men, L. T. Prince, O. Wimberly, C. M. Robinson, and J. W. Shelby, are listed as porter-brakemen who would retain rights to regular head-end passenger asignments in their respective seniority districts.

The black Silsbee, Texas brakemen formed a BRT lodge on July 11, 1965. The BRT thereafter, in August 1965, requested the Santa Fe to allow the Silsbee brakemen the opportunity for promotion to conductor. The Santa Fe, in a letter dated August 31, 1965, agreed that black trainmen as Silsbee would be afforded that opportunity. The procedure was to be that the Silsbee trainmen would be contacted in order of seniority and afforded an opportunity to pass the written and oral examination, and in addition, if the examination was taken and failed, the employee's seniority as trainman would not be affected. This procedure may be contrasted to the general contract between BRT and Santa Fe, covering white brakemen, which required that the brakeman take the conductor's exam within three years of becoming a brakeman, no waiver being permitted, and upon twice failing the exam, the brakeman would be dismissed or assigned to other service. However, as to any black trainmen employed at Silsbee after August 31, 1965, the Santa Fe stated that such trainman would be required to pass the conductor examination under the usual terms, with no waiver being permitted.

Excluding the deceased, retired and disability annuitants, the

possible active class members at the date of trial and their occupations are as follows:

| Name | Craft or Classification |
|---|---|
| Elgie Crow | Brakeman and conductor |
| A.M. Bennett | Brakeman and conductor |
| A. L. Woolfolk | Brakeman and conductor |
| T. C. Luckey | Brakeman and conductor |
| Raymond I. Wiley | Brakeman and conductor |
| Bobbie C. Papin | Flagman (restricted to flagman on passenger service) |
| Carl E. Chester | Fireman and oiler laborer |
| Samuel M. Talbert, Jr. | Locomotive Fireman and Locomotive Engineer |
| Herbert L. Jenkins | Librarian |
| Archie N. Jones | Security guard |
| Lawson C. Spencer | Business Car chef-porter |
| Criscell Kemp | Receiving benefits under Feb. 7 Agreement |
| W. W. Seymour | Brakeman on leave of absence since October 21, 1971 from Santa Fe to perform services as International Secretary-Treasurer of BSCP |
| A. L. Bennett | Employed by Amtrak since May 1, 1974 as chair car attendant |
| Forrest P. Tollett | Employed by Amtrak since May 1, 1974 as chair car attendant |
| Earlie Nash | Employed by Amtrak since May 1, 1974 |

Neither the UTU nor the BSCP represent the craft or class of fireman, oilers and laborer, locomotive engineer, librarian, security guard, or business car chef-porter.

All other plaintiffs and class members are retired, deceased, or disability annuitants.

Effective May 1, 1971, the Santa Fe discontinued passenger service. Effective that date, Amtrak took over. Effective May 1, 1974, all non-operational personnel on passenger trains operated by Amtrak on Santa Fe lines became employees of Amtrak; all operational personnel remained employees of the Santa Fe.

## THE LAW

42 U.S.C. § 2000e-2 provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The plaintiff in a Title VII case is required to establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Since plaintiffs here have alleged a systemwide pattern or practice of discrimination, they must establish more than the "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." They must establish that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice," and of a "repeated, routine, or of a generalized nature." *Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1855, 52 L.Ed.2d at 416 and n. 16. "The basic framework in a

pattern-or-practice suit...under Title VII of the Civil Rights Act is the same as that in any other lawsuit. The plaintiff has the burden of proving a prima facie case; if it does so, the burden of rebutting that case shifts to the defendant." *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (Stevens, J., dissenting). "At the initial, 'liability' stage of a pattern or practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed." *Teamsters*, 431 U.S. at 360, 97 S.Ct. at 1867, 52 L.Ed.2d at 430.

There can be no question that Santa Fe, except for the Silsbee District, deliberately segregated whites into brakeman and conductor positions and blacks into chair car attendant and train porter positions. There can be no question that this segregation was approved by, acquiesced in, and maintained and demanded by the "white" unions. The evidence is clear. For almost all the years of the Twentieth Century to date, there have been no black brakemen, no white train porters. Both positions required the performance of substantially similar braking duties; the difference in additional duties is insignificant compared to the similarity of total duties. The fact is that employees performing essentially the same duties were segregated into job category by race, and the evidence is overwhelming that such segregation was intentional. This is disparate treatment.

> "Disparate treatment"...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
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> * * * * * * *

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity...Proof of discriminatory motive, we have held, is not required under a disparate impact theory....

*Teamsters,* 431 U.S. at 335, 97 S.Ct. at 1854, 52 L.Ed.2d at 415, n. 15.

Defendants urge, however, that Title VII is prospective rather than retrospective, citing *Teamsters* and *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). They state that the discriminatory conduct, if any, was the segregated hiring, that the last such hiring took place in 1956, before the effective date of Title VII, and that therefore plaintiffs have not made out a prima facie case of post-Act discrimination. The Court disagrees. In the first place, we have here the situation described in *Teamsters* where pre-Act conduct has a discriminatory post-Act impact. Furthermore, we also are concerned with post-Act conduct in the alleged discriminatory refusal to transfer or promote plaintiffs to brakeman positions after the effective date of the Act.

In *McDonnell Douglas Corp., supra,* the Supreme Court found a prima facie case of discrimination by disparate treatment when the plaintiff showed:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677. The Court in *Teamsters* said that the criteria used in *McDonnell Douglas*

did not purport to be "an inflexible formulation," and that the facts and criteria would vary from case to case. 431 U.S. at 357, 97 S.Ct. at 1865, 52 L.Ed.2d at 429.

The Court has examined the facts here. We note at the outset that since we are concerned with liability, not remedy, at this stage of the proceedings, the ability of an individual plaintiff to perform brakeman's duties is not at issue. Every plaintiff at one time performed braking duties. Certain braking positions required additional duties, but those plaintiffs who performed such additional duties testified that their prior experience enabled them to quickly learn such duties. Brakemen and train porters took the same Rules Examinations and student trips. We therefore hold, for purposes of establishing class-wide liability, that the plaintiff class was qualified for promotion or transfer to brakemen's positions, by virtue of past experience. See *Love v. Pullman Company*, 569 F.2d 1074 (10th Cir. 1978), where the Tenth Circuit Court of Appeals made a similar finding for porters-in-charge and train conductors.

Summing up the evidence of disparate treatment, in accordance with the summation in *McDonnell Douglas Corp.*, we find that no black brakeman was appointed on Santa Fe, outside the Silsbee, Texas Seniority District, until 1967 or 1968, well after the effective date of Title VII, and that the Santa Fe's appointment of black brakemen did not accelerate until approximately 1970-71. We further find that no member of the plaintiff class was transferred to a brakeman's position until 1968, well after the effective date of Title VII, and that most such transfers were not made until approximately 1971. From the testimony of the individual plaintiffs, we find a general willingness and desire on the part of the plaintiff class for transfer to brakeman's positions, beginning at least as of the effective date of Title VII. We find that that desire and willingness was in several instances communicated to the Santa Fe, and infer from the evidence before us that the defendant Santa Fe was aware that black chair car attendants and train porters as a class were

desirous of becoming brakemen and conductors. We find that throughout the period between 1965 and the present, brakemen positions regularly became vacant and were filled, notwithstanding the general cutback in services and personnel undergone by the Santa Fe. We find that plaintiffs as a class were qualified to fill these positions. We find that plaintiffs as a class were not transferred to these positions, at least not for several years after the effective date of Title VII,[13] and that the positions were filled by persons who, if lacking prior braking experience, were not as qualified as plaintiffs.

These findings, in the Court's view, establish post-Act disparate treatment of plaintiffs as a class.

However, defendants urge that this action should be governed by *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) [Evans], rather than by *Teamsters,* and that *Evans* requires that we dismiss this action for failure to prove a continuing violation. *Evans* and *Teamsters* are companion cases; both were decided May 31, 1977. In *Evans,* a stewardess complained that her employer's previous no-marriage policy, under which she had been terminated and which was subsequently declared invalid, resulted in a denial to her, after her reinstatement, of her seniority accrued before she was terminated. She had not filed an EEOC complaint based on her termination. After her reinstatement, she filed an EEOC complaint alleging that the denial to her of past seniority was a continuing violation of Title VII. As to that, the Supreme Court said:

> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed

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[13] We note, as defendants urge, that at the present, 50% of the active class members, or 8 of 16, are employed by the Santa Fe in brakeman, conductor, flagman, fireman, and engineer capacities. We also note as plaintiffs urge, that these employees did not assume these functions for several years after the passage of the Act, and that comparatively more class members never assumed comparable functions.

> have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation.

431 U.S. at 558, 97 S.Ct. at 1889, 52 L.Ed.2d at 578-79.

The Court also said that her wrongful termination, since it was not the basis for a timely charge with the EEOC, "is the legal equivalent of a discriminatory act which occurred before the statute [Title VII] was passed." *Id.*

In *Teamsters*, by contrast, the defendant employer had, on a class-wide basis, separated employees into white and minority jobs. Black and Spanish-surnamed employees were primarily assigned to the lower paying city driver positions, with some whites also so assigned, while only whites were assigned to line or over-the-road driver positions. Such a segregation occurred both pre- and post-Act. The Supreme Court found a systematic pattern or practice of discrimination in the segregation. As to the post-Act discriminatees, the Court ordered full "make whole" relief under *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). As to the pre-Act discriminatees, the Court found that they too had stated a cause of action under Title VII, because the seniority system used by the employer, by which seniority could not be transferred from city to line driver positions, perpetuated the effect of pre-Act discrimination. The Court used a disparate impact theory in discussing this issue, saying:

> One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs, supra:*

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

401 U.S. at 430, 28 L.Ed.2d 158, 91 S.Ct. 849.

> . . . [T]he seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." *Ibid.*

*Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861, 52 L.Ed.2d at 424. The Supreme Court then went on to hold that though the seniority system had an adverse impact under *Griggs,* it was validated, in effect, by § 703(h) of Title VII, which exempts bona fide seniority systems from the operation of Title VII.

We are of the opinion and so hold that this case falls within the rationale of *Teamsters* rather than of *Evans.* The pre-Act discriminatory job segregation is the status quo which is frozen by the operation of the Santa Fe seniority system, under which seniority cannot be transferred from train porter to brakeman positions. Like *Teamsters,* the seniority system operates within a seniority division. See *Teamsters,* 431 U.S. at 342, 97 S.Ct. at 1858, 52 L.Ed.2d at 420 n. 26. The seniority system is not neutral in its operation, as was the case in *Evans. Teamsters*

provides a cause of action to these plaintiffs on a theory of disparate impact of the seniority system.[14] Plaintiffs have made out a prima facie case of discrimination by disparate impact of the seniority system as it applies to them, since it operates to freeze them into the positions to which they were assigned by the employer's pre-Act discrimination, and since it operates to deprive them of the "allocation of the choicest jobs, the greatest protection against layoffs, and other advantages..." *Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1862, 52 L.Ed.2d at 424.

The evidence supports the plaintiffs' position of discrimination against them by defendants on the basis of race. Defendants seek to overcome plaintiffs' prima facie evidence on two theories. First, as to disparate impact, defendants assert that the seniority system is bona fide under § 703(h) of the Act. We disagree with this assertion. Second, as to disparate treatment, defendants assert that they were required to act as they did by provisions of labor contracts and the Railway Labor Act. Although these provide a reason for defendants' conduct, they do not excuse defendants' discrimination against individual plaintiffs, as we will hereafter outline. We will discuss defendants' theories seriatim.

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[14] We have examined cases cited by defendants in support of their assertion that *Evans* governs. The factual situations in several of these cases were more like *Evans* than *Teamsters,* and the cases are inapplicable. *DeGraffenreid v. General Motors Assembly Div.,* 558 F.2d 480 (8th Cir. 1977); *Martin v. Georgia-Pacific Corp.,* 568 F.2d 58 (8th Cir. 1977); *Freude v. Bell Telephone Company of Pennsylvania,* 438 F.Supp. 1059 (E.D.Pa. 1977). In *Acha v. Beame,* 438 F.Supp. 70 (S.D.N.Y. 1977), the court said that "*Teamsters* held that a Title VII violation may not be premised upon discriminatory acts which occurred before the effective date of Title VII even though a present seniority system perpetuates the effect of pre-Title VII discrimination." 438 F.Supp. at 76. We disagree with the *Acha* court's interpretation of *Teamsters;* our interpretation is that a Title VII violation may be so premised if the seniority system in question is not bona fide. In sum, we disagree with cases cited by defendant on this issue.

## THE SENIORITY SYSTEM

42 U.S.C. § 2000e-2[§ 703(h) of Title VII] provides in pertinent part:

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system,...provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin...

The Supreme Court dealt with the issue of what was meant by a bona fide seniority system in the *Teamsters* case. The Court rejected the view that a seniority system is invalid merely because it perpetuates the effects of past discrimination. In interpreting § 703(h) of Title VII, the Court stated:

> In sum, the unmistakable purpose of §703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352, 97 S.Ct. at 1863, 52 L.Ed.2d at 426. However, the Court recognized "the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adop-

tion." 431 U.S. at 346, 97 S.Ct. at 1860, 52 L.Ed.2d at 422 n. 28. The Court states the criteria of a bona fide system as follows:

> The seniority system in this case is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with NLRB precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

431 U.S. at 355, 97 S.Ct. at 1865, 52 L.Ed.2d at 427-28.

The criteria have been considered by a few courts. In *Croker v. Boeing Co. (Vertol Div.),* 437 F.Supp. 1138, 1187 (E.D.Penn. 1977), the court said:

> In this case, the plaintiff's evidence in no way establishes that Boeing Vertol's job family system is other than bona fide and facially neutral . . . The plaintiffs presented no evidence to show that creation of the job family system in 1956 was intended to preserve discriminatory patterns of employment. To the extent the restrictions of the job family system lock employees in undesirable jobs, the system affects blacks and whites in such jobs equally. Consequently, the job family system is not itself unlawful under Title VII.

In *Chrapliwy v. Uniroyal, Inc.*, 15 E.P.D. ¶7933 (N.D.Ind.1977), the court held a seniority system unlawful because it had its genesis in discrimination.

> [B]efore the passage of the Act, Uniroyal ". . . kept segregated seniority lists according to sex . . ." [Citations omitted]. From 1965 through 1970 it was found that the A-B system of employment was only a disguise to the former segregated system. Finally, from 1970 to the present, this court found that the classification of certain jobs as those which "should not be performed by females" unlawfully discriminates on the bases of sex. In short, it is clear that the employment system at Uniroyal has had as its genesis discriminatory conduct both before and after passage of the Act.

The court in *Southbridge Plastics Division, Etc. v. Local 759, Etc.*, 565 F.2d 913, 916 (5th Cir. 1978) said "*Teamsters* holds that absent a showing of discriminatory purpose in a seniority system, that system is protected by § 703(h) from attack on other Title VII grounds."

On of the most detailed analyses of this issue is found in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 351-52 (5th cir. 1977):

> As we read the *Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide . . . The Court's analysis suggests that the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue . . In *Teamsters* the Court focused on four factors:
>
> > 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2) whether the seniority units are in the same or separate bargaining units (if the laterr, whether that structure is rational and in conformance with industry practice);

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose.

The Court analyzed the context in which the seniority system developed. In discussing the relationship of seniority units to bargaining units, the Court quoted a National Labor Relations Board opinion that emphasized the rationality of separate bargaining units in the case of over-the-road and city drivers "where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests." [431 U.S. at 356, 97 S.Ct. at 1865, 52 L.Ed.2d at 428 n. 42]. Thus, the facts of a particular seniority unit are critical to a determination whether the system is bona fide; and a case-by-case analysis of seniority systems in light of section 703(h) is necessary.

The *Stockham Valves* court expressed dissatisfaction with teh district court's finding that the seniority system was bona fide. The appellate court directed the lower court on remand to pay particular attention to the facts indicating that the seniority system had its genesis and was negotiated and maintained in discriminatory conditions and that the seniority units did not reflect existing separate and distinct bargaining units.

We have analyzed the seniority system in this case according to the criteria as listed in *Teamsters* and analyzed by *Stockham Valves,* and conclude that the seniority system is not bona fide.

Since for the most part conductors achieve that position in a progression from a brakeman position, our main concern is with the seniority system for brakemen, and our discussion will

center around that system. Brakeman seniority begins as of the day the employee is qualified as a brakeman, and is accumulated within a seniority district and is not transferable from one seniority district to another, nor is seniority in another craft transferable to a brakeman position, except that a conductor continues to accumulate brakeman as well as conductor seniority. It is important that we distinguish between this seniority system *per se* and the segregation of employees into different crafts. That segregation is the deliberate historic exclusion of black men from the trainmen crafts of brakeman and conductor. *Teamsters* makes it clear that the brakeman seniority system is not unlawful under § 703(h) merely because it perpetuates pre-Act exclusion and segregation. Our concern is with whether an intent to discriminate entered into the adoption and maintenance of the seniority system, not with whether an intent to discriminate entered into the segregation of employees. The four criteria listed in *Teamsters* must be applied to the seniority system.

First, the seniority system is neutral on its face and applies equally to all brakemen. No transferee to a brakeman position, black or white, would accrue seniority any differently than any other transferee. In this regard, we analyze the present operation of the seniority system, as did the *Teamsters* Court.

Second, the structure of separate crafts or bargaining units is rational, in accord with the industry practice, and consistent with Railway Labor Act [RLA] precedents. The crafts have been recognized by the federal government and its agencies. The separate crafts have separate certified bargaining representatives under the RLA, they are denominated as separate crafts by the National Mediation Board under the RLA, and they were recognized by the United States Government by Supplement No. 12 to General Order 27 in 1918. The separate crafts are in accord with industry practice as the craft structure on the Santa Fe has existed in substantially the same form since the late 1800's and has existed on the other railway lines in the United

States. At any rate, this Court cannot impose liability because of the structure of separate crafts, for the separation into two crafts by race is the very discrimination which the *Teamsters* Court said would not, standing alone, invalidate a seniority system.

We determine that the seniority system in question does not meet the third and fourth criteria. The seniority system had its genesis in racial discrimination and was created and maintained with illegal purpose. The defendants argue that the seniority system was first established in 1892 and that the position of train porter was not created until 1899, so the seniority system could not have had its genesis in racial discrimination against train porters. They argue that the seniority system has been in continuous effect in substantially the same form from 1892 to the present time. Defendants assert that this historical evidence indicates that the seniority system was created and maintained to offer job security and economic protection. In the Court's opinion, this argument goes to the first factor in the *Teamsters* analysis, that the seniority system is neutral on its face. We have already held that it is neutral. We must look to other facts to determine the nature of the genesis and maintenance of the seniority system. The *Stockham Valves* court has considered this issue.

> The seniority system at Stockham was adopted in a collective bargaining agreement in 1949, when segregation in the Sourth was standard operating procedure. The history of the negotiations associated with Stockham's seniority system is clouded. Since 1967 the local union has sought major revisions in the departmental seniority system through contract negotiations with the defendant Stockham. In 1970 the union struck for five months seeking the company's agreement with its proposals, including plant-wide seniority. Stockham's failure to go along with revisions in the seniority system must be evaluated in the context of the company's extensive unlawful employment

practices during the period of the negotiations and its intransigent adherence to wide-spread segregated facilities at the plant, at least until 1974.

Here, we have a seniority system which was adopted and maintained during a period when segregation was standard operating procedure on the Santa Fe. The seniority system was created by collective bargaining at a time when there were no black brakemen and no white train porters, at a time when blacks as a class performed only the most menial tasks on the railroad. It would not be until 1918 that "colored men employed as firemen, trainmen, and switchmen [were] paid the same rate of wages as [were] paid white men in the same category," and that only by order of the United States Government. *See* note 4. The unions which maintained the seniority system through negotiations and collective bargaining with the Santa Fe had clauses in their Constitutions with limited membership to white males. This written prohibition of black membership lasted at least from the 1930's to the 1960's, and there were no blacks in the unions before the 1930's. Since blacks were not eligible for membership in the unions, they could not be employed as brakemen or conducters, and they could not be eligible for the economic protection of the seniority systems in question. It was not until 1950 that chair car attendants had a written seniority system which was established through collective bargaining with the Santa Fe, and the train porters never had a written seniority system at all. The seniority system was used by the unions to deprive blacks of their train porter positions.

In sum, we conclude and so hold that the seniority system had its genesis in racial discrimination and was created and maintained with illegal purpose, that it fails to meet the *Teamsters* test, and that it is not bona fide. It follows that liability may be imposed against the Santa Fe in favor of the plaintiff class members.

We also conclude that liability may be imposed against the UTU. 42 U.S.C. § 2000e—2 provides in pertinent part:

(c) It shall be an unlawful employment practice for a labor organization—

* * * * * *

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

There was no detailed analysis of this provision in *Teamsters*. The *Teamsters* Court said "[b]ecause the seniority system was protected by § 703(h), the union's conduct in agreeing to and maintaining the system did not violate Title VII." 431 U.S. at 356, 97 S.Ct. at 1865, 52 L.Ed.2d at 428. The courts which have considered the issue say that if the seniority system is not protected by § 703(h), there must be an additional determination of the union's role in agreeing to, maintaining, or otherwise ratifying the seniority system. See *James v. Stockham Valves & Fittings Co., supra; United States v. East Texas Motor Freight System*, 564 F.2d 179 (5th Cir. 1977). We have made such a determination and conclude that the UTU is properly liable. The UTU and its predecessors played a principal role in the creation and maintenance of the seniority systems through collective bargaining between themselves and the Santa Fe. There is no indication in the facts that this collective bargaining was at less than arms length or that Santa Fe controlled the resulting labor agreements, and thus the UTU and its predecessors were equally responsible for the resulting seniority system. In addition to their role in collective bargaining, the unions were also involved in some of the conduct which led the Court to conclude that the seniority system was invalid, most notably the creation of the Constitutions which excluded blacks from union membership. We conclude that the unions' role in creating, maintaining, and otherwise ratifying the seniority system was at least as great as Santa Fe's role, and that therefore liability is properly imposed upon the UTU under Title VII.

## POST—ACT DISCRIMINATION

We have stated that plaintiffs have made out a prima facie case of post-Act discrimination against them as a class under the standards of *McDonnell Douglas Corp. v. Green, supra.* Defendants may rebut this by meeting their burden "to articulate some legitimate, nondiscriminatory reason" for their conduct in not transferring and promoting plaintiffs. If defendants present the Court with such a reason, plaintiffs may show that defendants' stated reason for not transferring and promoting them was pretext. *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 678 and 679. Defendants point to the Feb. 7 agreement as a legitimate nondiscriminatory reason for the Santa Fe's failure to unilaterally transfer the plaintiff class to other positions for which they were as a class qualified. The Court has analyzed the Feb. 7 agreement and agrees with defendants. We further find no pretext. However, we find that the Santa Fe may be liable to individual plaintiffs for a discriminatory refusal to transfer them in situations where the Feb. 7 agreement was not applicable.

The Feb. 7 agreement is legitimate. Congress has throughout the years created a number of structures and systems governing numerous facets of labor relations. One such structure, Title VII, is designed to prohibit and eliminate racial and other discrimination in employment, while the RLA is one of the structures designed to promote the orderly management of labor through collective bargaining. Both purposes are important, and neither statute repeals the other. The relation between the two kinds of employment statutes has been addressed in anumber of cases. In *Southbridge Plastics, supra,* the employer brought an action pursuant to the Labor Management Relations Act [LMRA] seeking a declaratory judgment that a conciliation agreement it had entered into with the EEOC overrode any contradictory provisions contained in a collective bargaining agreement with the union; the union counterclaimed seeking arbitration. The district court found the conciliation binding; on ap-

peal the Fifth Circuit reversed. In so doing, the court quoted with approval from *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), amended and modified on other grounds, 556 F.2d 758 (5th Cir. 1977):

> We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important policies also emanate from the NLRA [National Labor Relations Act], among them the principle that terms and conditions of employment are to be shaped by the employer and the exclusive bargaining representatives of its employees.

The same principles apply to the RLA as to the LMRA and the NLRA. See *United States v. St. Louis-San Francisco Railway Co.*, 52 F.R.D. 276 (E.D.Mo.1971); *Norman v. Missouri-Pacific Railroad Co.*, 414 F.2d 73 (8th Cir. 1969). The collective bargaining provisions of the RLA are not invalidated by Title VII.

It was the BSCP, the exclusive bargaining representative of plaintiffs, which entered into the Feb. 7 agreement which forbade the Santa Fe to unilaterally transfer employees covered by the agreement, which included most if not all of the plaintiff class members. The agreement is not discriminatory on its face, nor is there any evidence that the intent of the BSCP in entering into the agreement was discriminatory. On the contrary, the evidenc eis that the intent was to ensure that plaintiffs would not be arbitrarily deprived of their jobs by their employer. Furthermore, once it became apparent that certain employees covered by the Feb. 7 agreement were seeking transfers to other positions, the BSCP and the Santa Fe negotiated to extend, and did extend, the agreement to permit the transfer of qualified employees covered by the agreement without any loss by them of the protection of the Feb. 7 agreement. This collective bargaining is important under and is protected by the RLA. We refuse to find that Title VII required defendant Santa Fe to act

in contravention of the agreement, and therefore hold that the Feb. 7 agreement is a legitimate nondiscriminatory reason for Santa Fe's failure to unilaterally transfer or promote the plaintiff class members to the brakeman positions for which they were as a class qualified. We further hold that the Santa Fe followed the terms of the agreement because it was required to by the RLA, and not as a pretext. In light of the protest by the BSCP of the voluntary transfer of two of its members, we believe that the BSCP, certified bargaining representative of the plaintiff class, would have vehemently protested any attempt by the Santa Fe to violate the Feb. 7 agreement. There is no pretext in such a situation.

However, there is testimony of discriminatory conduct by the Santa Fe in situations not covered by the Feb. 7 agreement. The Feb. 7 agreement did not prohibit any plaintiff from transferring to another position nor prohibit the Santa Fe from permitting such a voluntary transfer. It appears to the Court that the Santa Fe showed great reluctance to transfer or promote the black train porters and chair car attendants who affirmatively sought such transfer. The individual testimony of plaintiffs includes a number of instances where a plaintiff expressed interest in voluntary transfer to another position, only to be met by evasion, rejection, or refusal on the part of the Santa Fe, with a number of reasons given for refusal ranging from Award 19324 to the Feb. 7 agreement to the plaintiff's age to the plaintiff's lack of BRT membership to the seniority that the plaintiff would have to give up. In every case, the Santa Fe refused, directly or indirectly, to transfer or promote black chair car attendants and train porters. This conduct, being outside the Feb. 7 agreement, cannot be excused by it. The prima facie case of post-Act discrimination had not been rebutted as to this conduct of the Santa Fe. Therefore, those individual plaintiffs who suffered this post-Act discriminatory conduct have a basis of liability in addition to the invalidity of the seniority system. The Supreme Court in *Teamsters* affirmed the holding of *Franks v. Bowman Transportation Co., supra,* that "§ 703(h) does not

bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination . . ." and that "[p]ost-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman, supra,* without attacking the legality of the seniority system as applied to them." 431 U.S. at 346, 97 S.Ct. at 1860, 52 L.Ed.2d at 422.

The UTU has no liability for post-Act discriminatory conduct, for it neither had nor exercised any hiring and transfer authority, and therefore did not engage in any employment conduct which affected plaintiffs.

## DAMAGES

As noted earlier, the parties agreed that the case be tried in two stages, a liability stage and a damage stage. Because we have found liability on the part of both Santa Fe and the UTU, the case will proceed to the damages stage. To expedite matters, we note the following:

Since Santa Fe has previously settled all claims for damages, back pay, and attorneys' fees with all plaintiffs, there will be no damages or attorneys' fees award against Santa Fe in favor of plaintiffs. Monetary relief and attorneys' fees may be awarded against the UTU, since it has not settled these claims with plaintiffs.

Retroactive seniority may be awarded to plaintiffs, and this remedy may be awarded against the Santa Fe, since the railroad remained a party for purposes of injunctive relief and seniority carryover. Seniority relief may also be awarded against the UTU. Retroactive seniority may not be awarded prior to the effective date of Title VII. *Teamsters, supra; Franks v. Bowman Transportation Co., supra. Teamsters* sets out standards under which individual plaintiffs will be eligible for an award of retroactive seniority. Only those plaintiffs who are still actively employed by the Santa Fe will benefit from an award of retroactive seniority.

We direct that counsel present to the Court within thirty days after receipt of this decision their proposed findings concerning the manner in which the damage and equitable relief issues of the case should be ordered.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4963

Joe Vernon Sears, et al, an
individual in person and for
all other persons similarly
situated,

and

The Brotherhood of Sleeping
Car Porters,
Plaintiffs,

vs.

The Atchison, Topeka and Santa Fe
Railway Company and United
Transportation Union, successor
to Brotherhood of Railway Trainmen,
a labor organization,
Defendants.

**MEMORANDUM AND ORDER**

Filed Oct. 23, 1978

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* [Title VII or the Act]. The action is now in its second or damage stage. The first or liability stage of the action was concluded on June 14, 1978, when the Court rendered a decision in favor of the plaintiff class against the defendants The Atchison, Topeka and Santa Fe Railway Company [Santa Fe] and the United Transportation Union [UTU]. 454 F.Supp. 158 (D. Kan. 1978).

A Summary of the facts and earlier decision is appropriate. The plaintiffs are black male Americans who at any time were employed by Santa Fe as train porters and who have been employed by Santa Fe, in any capacity, during the period from

July 2, 1965. Plaintiffs charged the Santa Fe and UTU with discrimination on the basis of race. The Santa Fe settled all claims for damages, back pay, and attorneys' fees with plaintiffs, but remained a party for purposes of injunctive relief and seniority carryover. The UTU made no settlement with plaintiffs. The Court determined that the seniority system entered into between the UTU or its predecessors and the Santa Fe was not bona fide under § 703(h) of Title VII, because it had its genesis and was created and maintained in racial discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977) [*Teamsters*]. Liability was therefore properly imposed on a discriminatory impact theory for the perpetuation of past discrimination by the invalid seniority system after the effective date of Title VII. We held that the UTU was equally responsible with the Santa Fe for the creation and maintenance of the invalid seniority system, and that creation and maintenance of the invalid seniority system, and that liability could be imposed on the UTU. Monetary relief and attorneys' fees may be awarded against the UTU, while seniority relief may be awarded against both the UTU and the Santa Fe. Seniority relief was also held an appropriate remedy against the Santa Fe for the post-Act discrimination against the plaintiff class. The Court held that the UTU engaged in no post-Act discriminatory conduct against the plaintiffs.

The Court requested briefs from the parties as to how the damage stage of the trial should proceed. We have been fully briefed and are now ready to set out guidelines to expedite matters.

The statute provides for remedies in 42 U.S.C. § 2000e-5(g):

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as

> may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The 1972 amendments to Title VII added the provisions which authorized the Court to order affirmative action not limited solely to the enumerated affirmative acts and such other equitable relief as deemed appropriate, and the provisions which set forth the accrual date for back pay.

The remedies of Title VII are equitable in nature. One purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful discrimination." *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975). The courts have been armed with full equitable powers to fashion remedies which will achieve this "make whole" purpose. *Id.* Back pay is one such remedy. The Supreme Court stated in *Albemarle* that:

> Back pay has an obvious connection with this purpose [to achieve equality of employment opportunities]. If

> employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." [citation omitted]
>
> * * *
>
> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. . . .

45 L.Ed.2d at 296-97, 298-99. However, a back pay award is not punitive in nature, but equitable, intended to restore the recipients to their rightful economic status. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismd.* 404 U.S. 1006, 30 L.Ed.2d 655, 92 S.Ct. 573, *cert. dismd.* 404 U.S. 1007, 30 L.Ed.2d 655, 92 S.Ct. 651. It follows that plaintiffs must show actual financial loss before they are entitled to back pay. *See generally United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Johnson v. Goodyear Tire & Rubber, Co., Synthetic Rubber Plant,* 491 F.2d 1364 (5th Cir. 1974). In some situations, courts have made a determination of financial loss on a class-wide basis. To justify such an award, plaintiffs proved that there was a class whose members suffered economic loss as a result of discrimination; such proof established a *prima facie* claim to back pay for each member of the class. *United Transp. U. Loc. No. 974 v. Norfolk & W. Ry.* 532 F.2d 336 (4th Cir. 1975); *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, supra.*

An award of back seniority is another equitable remedy which may be necessary to achieve the "make whole" purpose of the act. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 47 L.Ed.2d 444, 96 S.Ct. 1251 (1976); *Teamsters.* As with back pay, an award of seniority relief should generally be made "unless there exist reasons for denying relief' 'which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination. . . and making persons whole for injuries suffered.' ' " *Teamsters.* 52 L.Ed.2d at 433, quoting *Franks* which quoted *Albemarle.* The seniority award should be that which will slot the victim in that position in the seniority system that would have been his had he been hired or transferred at the time of his application or at the time he would have applied but for the discriminatory practices. *Franks,* 47 L.Ed.2d at 462; *Teamsters,* 52 L.Ed.2d at 438.

The Court notes that a plaintiff who suffered only pre-Act discrimination is of course not entitled to relief, for Title VII is not retroactive. *See Teamsters,* 52 L.Ed.2d at 428. No person may be given retroactive seniority to a date earlier than the effective date of the Act, *id.,* or back pay for periods earlier than that time.

As we have remarked, there are two different sorts of discrimination at issue here. First, there is the discriminatory impact of the invalid seniority system. This impact is upon those clasmembers who performed braking duties but did not accrue brakeman seniority, i.e., persons employed as train porters. Liability for this discriminatory impact is properly imposed upon both the UTU and the Santa Fe, the UTU being liable for back pay, damages, and attorneys' fees and both being liable for back seniority. Second, there is the discriminatory treatment by the Santa Fe after the effective date of the Act in refusing to transfer or promote class members. Liability for this discriminatory treatment is properly imposed only upon the Santa Fe, and back seniority is the only remaining remedy.

There are also two different groups or subclasses of class members, those who were serving as train porters when Title VII went into effect in 1965 and those who have been demoted to chair car attendants at an earlier date. As we discussed in the first stage of this opinion, all class members with a seniority date after April 20, 1942, were precluded from serving as train porters after 1959 by virtue of Award 19324. These class members were chair car attendants thereafter. They were not performing braking duties as of the effective date of Title VII. Since these class members were not performing braking duties, they had no right to accumulate brakemen seniority, and the invalid seniority system had no discriminatory impact upon them as of the effective date of the Act. Whether or not the events culminating in Award 19324 constituted discrimination on the part of the UTU and its predecessors is irrelevant because pre-Act discrimination does not entitle a victim to relief under the Act. *Teamsters, supra.* The only compensable discrimination suffered by those persons employed as chair car attendants as of July 2, 1965 was perpetrated by the Santa Fe, not the UTU. This group of plaintiffs is not entitled to an award of back pay against the UTU, but only to a grant of seniority. We will discuss further how such a grant is to be awarded.

The second group of plaintiffs is those persons who had a seniority date prior to April 20, 1942, remained train porters, and were entitled to perform braking duties as of the effective date of Title VII. The invalid seniority system therefore had a discriminatory impact upon them. Under *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971), such a practice which perpetuates the effects of prior discrimination is violative of Title VII. Unlike the result in *Teamsters,* the seniority system here is invalid, and therefore the perpetuation of past discrimination by it is the basis of imposing liaiblity against the UTU. These persons are therefore entitled to back pay and attoarneys fees from the UTU as well as seniority relief as to both defendants.

**Subclass of Train Porters**

As we noted, those class members serving as train porters as of 1965 are entitled to back pay since they were damaged by the invalid seniority system. The back pay is what each would have received had he been employed as a brakeman. The Court found previously that train porters and brakemen received the same mileage rate or hourly rate on passenger trains, but that brakemen on passenger trains received additional compensation such as pay in connection with delays, so that the total wages paid to a brakeman on a passenger train were higher than those paid to a train porter. Also, brakemen on other types of trains received other compensation. A back pay award to a plaintiff would be an award of the difference in a train porter's and a brakeman's total compensation. Such an award would be in essence a monetary realization of the fact that the plaintiff should have been employed as a brakeman because he should have been able to accrue brakeman's seniority for performing brakeman's duties, but was unable to do so because of the invalid seniority system.

The Supreme Court has said that seniority may not be awarded prior to the effective date of Title VII. *Teamsters*. Since any back pay award in this action is derived from a determination that the plaintiff should have had brakeman's seniority, an award of back pay is tied to the date such seniority should have begun to accrue. This cannot be before July 2, 1965. Plaintiffs urge that each class member should be deemed to have had some 15 years of brakeman's seniority as of July 2, 1965, so as to be placed in his "rightful place." This we cannot do, for to grant back pay as though the class member had several years of past seniority would be to award seniority prior to the effective date of Title VII. However, we do determine that *all* members of this subsclass are presumptively entitled to accrue brakeman's seniority and pay as of July 2, 1965, since plaintiff Sears filed his EEOC complaint less than two years later.[1]

A class-wide entitlement is appropriate for the following reasons. First, all members of the train porter subclass received less than brakemen, so that there is a class-wide harm. Second, the situation of the subclass is unlike the situation in *Teamsters,* for these men did n need to transfer to other positions in order to eliminate the discrimination they suffered. This is not a situation of disparate treatment that may or may not have been suffered by an individual, but an instance where all have suffered disparate impact.

We will require, of course, that the amount of back pay due be determined on an individual basis, since this is an equitable award designed to put each into the place he would have been. The Court considers that the use of averages may be appropriate. The 10th Circuit Court of Appeals in *Love v. The Pullman Co.,* 569 F.2d 1074, 1977 (10th Cir. 1978), a case decided after *Teamsters,* approved the Colorado U.S. District Court's use of averages in fixing back pay awards for porters-in-charge who performed conductors' work without conductors' compensations:

> Each member of the class was harmed. There was no showing under *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, that any member of the class would have received less under the combined classification [merging seniority rosters of porters-in-charge and conductors]. Under these circumstances, and in view of the impossibility of reconstructing the relationship of the members in the combined classification, and relating to the available runs, the use of averages derived from the separate classifications is a reasonable basis for a back-pay formula. *See Stewart v. General Motors Corp.,* 542 F.2d 445 (7th Cir.); *Sabala v. Western Gillette, Inc.,* 516 F.2d 1251 (5th Cir.); and *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir.).

As plaintiffs note, the holdings in *Sabala* and *Pettway,* insofar as they conflict with *Teamsters* by deciding that seniority

systems which perpetruate prior discrimination are without more invalid, are overruled, but are still relevant insofar as they discuss remedies under Title VII. We have no problem in stating that averages may be used when there is an invalid seniority system. We think averages may be appropriate because, as plaintiffs point out, it would be difficult to determine at this late date what each subclass members would have done in terms of making bids for positions. The chaim of events cannot be reconstructed. By using averages, those high-paying and those low-paying positions will be combined. We feel plaintiffs stated it well in their Response Brief, note 9:

> . . . Some brakemen might select shorter trips so as not to be awary from home as much as those who selected longer trips. Other brakemen might select work on passenger trains while still others would remain in the freight service. As to any particular train porter, the assumption that he might exercise his seniority in the same manner as the white brakeman with whom he is compared [in the defendants' method of calculation] could either be unfair to the train porter or unfair to the UTU. In addition, going back and crating the exact condition that existed with respect to each and every possible opening that might have been available to a train porter after the effective date of Title VII could be impractical. The Plaintiffs believe that an equitable adjustment of these conflicting and competing claims is achieved by using averages which take into account those white brakemen who may have earned more because of their particular selection of jobs as well as the wages of those white brakemen who selected the lower paying jobs.

Also, there would be no need to determine when particular vacancies occurred. As we stated in our earlier Memorandum and Decision, p. 21, brakemen and conductor positions were always open in periods of force reduction due to resignation, death, disability, or promotion of the Santa Fe brakemen or conductors. We think these class members are entitled to

presume that there would have been opportunities for them to bid their seniority the same as white brakemen with similar seniority.

The period of time in which these class members are entitled to back pay is that period from 1965 on until they were no longer capable of performing an active day's work. This may be evidenced by each's termination, retirement, or disability date. This evidence should be produced by each plaintiff, and may be rebutted by defendants.

We therefore tentatively propose the following formula, to be applied to each class member:

1) Determine the average compensation paid a white brakemen with seniority as of July 2, 1965, until the date the plaintiff could no longer work.

2) Subtract the actual compensation paid the class member.

3) Subtract the amount received by the class member from the Santa Fe.

4) Add interest at the legal rate from July 2, 1965.

The Court is not aware that any member of this subsclass is still activley employed by the Santa Fe. However, an active subclass member would be entitled to an award of brakeman seniority as of July 2, 1965, rather than as of the date he did or would have applied for transfer, since this damage award deems that he accrued such seniority from and after July 2, 1965. An award of front pay, a monetary award calculated to terminate the date a victim of discrimination attains an opportunity to move to his "rightful place," is inappropriate except for active subclass members. *Cf. James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977).

**Subclass of Chair Car Attendants**

The Court has already stated that those class members employed as chair car attendants as of the effective date of the

Act are not entitled to back pay from the UTU. An additional reason for this holding is that any back pay award would be in effect a determination that the class member is entitled to seniority for braking duties performed before 1965, and under *Teamsters,* as we said, we cannot make such a determination. The Santa Fe has settled all claims for back pay arising in connection with awards of seniority for post-Act discrimination. The only remedy available to these class members is an award of brakeman seniority. This seniority is only available to those class members still actively employed, since only they would benefit from it.

In accordance with *Teamsters,* PART III, we will distinguish between subclass members who applied for transfer and/or promotion and those who did not.

**Applicants**

The Supreme Court discussed presumptions which could be applied in situations where discrimination victims had made some application:

> As was true of the particular facts in Franks [v. Bowman, supra], and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already shown to have maintained a policy of discriminatory decisionmaking.
>
> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force,

was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in Franks, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. *Teamsters,* 52 L.Ed.2d 431-32.

The Court explained the reasons behind the evidentiary scheme:

> The holding in Franks that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evalutations of probabilities and to conform with a party's superior access to the proof. [citations omitted] These factors were present in Franks. Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. Insorfar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process. *Teamsters n. 45.*

This Court found a pattern or practice of discrimination on the part of the Santa Fe. As we stated in our earlier Memoran-

dum and Order, June 14, 1978, at 27, we found no appointment of black brakemen on the Santa Fe, outside the Silsbee District, until well after the effective date of Title VII, although plaintiffs as a class were desirous of such appointments, as the Santa Fe knew, and although there were regular vacancies to which plaintiffs could have been appointed and for which they were as a class qualified.

Individual chair and car attendant plaintiffs who were not transferred to brakemen positions when they first applied are entitled to the presumption that the Santa Fe's action in not transferring them was discriminatory. This presumption may be rebutted by the Santa Fe, as the Supreme Court stated in *Teamsters*. To meet his burden of proof, each plaintiff must show:

1) The date he applied for a transfer or promotion;

2) He was physically qualified for the job of brakeman. This may be shown by submitting evidence that he performed another job for the Santa Fe requiring physical activity.

Plaintiffs who prove these two elements are entitled to the following presumptions which we applied to the class in our June Memorandum and Order:

1) That he was unable to perform the job functions of a brakeman, since he had done so in the past;

2) That a vacancy for a brakeman existed at the time of his application, since vacancies regularly occurred and were filled.

We will not require that plaintiffs who actually applied for a transfer prove that they would have resigned their February 7th Agreement protection and their seniority as chair car attendants, for the evidence has been that plaintiffs knew that they would lose these benefits upon transferring to brakeman positions, as this was a characteristic of the craft seniority systems of the railroad. By applying for brakeman positions, they in-

dicated a willingness to give up February 7th Agreement protection and chair car attendant seniority.

Plaintiffs who applied for and were transferred to brakemen positions, but wish to show that they would have applied at an earlier date but for the Santa Fe's discriminatory practices, will be required to prove the elements of proof for those who made no application, as to that earlier date.

**Nonapplicants**

Chair car attendant nonapplicants may be entitled to relief.

> [A]n incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority. Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly. *Teamsters,* 52 L.Ed.2d at 433.

*Teamsters* goes on to discuss that difficult burden:

> A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. [citations omitted] When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the presumption discussed in Part III-A, supra. 52 L.Ed.2d at 435.
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> The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them. It does not show which of the nonapplicants actually wanted such jobs, or

> which possessed the requisite qualifications.... 52 L.Ed.2d at 436.

A plaintiff's current willingness to transfer into a brakeman position does not confirm his past desire for the job:

> A willingness to accept the job security and bidding power afforded by retroactive seniority says little about what choice an employee would have made had he previously been given the opportunity freely to choose a starting line-driver job. While it may be true that many of the non-applicant employees desired and would have applied for line-driver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each specific individual ...52 L.Ed.2d at 437.
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> * * *
>
> To the extent that an incumbent was deterred from applying by his desire to retain his competitive seniority, he simply did not want a line-driver job requiring him to start at the bottom of the "board." Those nonapplicants who did not apply for transfer because they were unwilling to give up their previously acquired seniority suffered only from a lawful deterrent imposed on all employees regardless of race or ethnicity. The nonapplicant's remedy in such cases is limited solely to the relief, if any, to which he may be entitled because of the discrimination he encountered at a time when he wanted to take a starting line-driver job. *Teamsters, n. 56.*

The Court has considered whether nonapplicants should be required to prove that they would have given up their February 7th Agreement protection and chair car attendant seniority, and would have been willing to start at the bottom of the brakeman seniority board. Plaintiffs assert that such a requirement would be giving effect to the invalid seniority system by making a class member prove he would have been willing to have gone to work

under that seniority system, and that such a requirement would therefore perpetuate the effects of past discrimination. We must reject this argument. First, this subclass of chair car attendant plaintiffs, since not employed as train porters as of the effective date of the Act, did not suffer the discriminatory impact of the seniority system. As we noted earlier, these plaintiffs performed braking duties before, not after, the effective date of the Act, and are not entitled to relief for injuries suffered in that earlier period. These plaintiffs were in the same position as other employees of the railroad, i.e., they would have had to give up the seniority in one craft to transfer to another. They were not in the same position as the subclass of train porters, who did not accrue brakemen's seniority though they performed brakemen's duties. Second, this subclass of plaintiffs was bound by the terms of the February 7th Agreement. As the Court noted in the June Memorandum and Order, the February 7th Agreement was valid, entered into between plaintiffs' union and plaintiffs' employer, and was binding upon them. Chair car attendants had benefits and protections under the February 7th Agreement, but until March 1971, could not voluntarily transfer to another position with the Santa Fe without losing their seniority as chair car attendants. Title VII does not give this Court the authority to change the terms of the Agreement under these circumstances. *Cf. Southbridge Plastics Division, Etc. v. Local 759, Etc.*, 565 F.2d 913 (5th Cir. 1978), where an earlier collective bargaining contract took precedence over a conciliation agreement entered into which the EEOC pursuant to Title VII. These plaintiffs, therefore must show to the satisfaction of the Court they they would have been willing, prior to March 23, 1971, to give up chair car attendant seniority and the protections of the February 7th Agreement, and that they would have been willing to start at the bottom of the brakeman seniority roster.

To meet his burden of proof, each plaintiff must show:

1) He would have applied for the job of brakeman with the Santa Fe, being willing

a) to give up the protections of the February 7th Agreement between February 8, 1966 and March 23, 1971,

b) to resign his seniority as a chair car attendant prior to March 23, 1971, and

c) to begin at the bottom of the brakeman seniority roster;

2) The date he would have applied for the job of brakeman under these conditions;

3) He was physically qualified for the job of brakeman. This may be shown by submitting evidence that he performed another job for the Santa Fe requiring physical activity.

Plaintiffs who prove these three elements are entitled to the following presumptions which we applied to the class in our June Memorandum and Order.

1) That he was able to perform the job functions of a brakeman, since he had done so in the past;

2) That a vacancy for a brakeman existed at the time of his application, since vacancies regularly occurred and were filled.

Applicant and nonapplicant chair car attendants who show these required elements set out above will have shown that they were actual victims of discrimination, entitled to the relief that will as nearly as possible, "recreate the conditions and relationships that would have been had there been no unlawful discrimination. *Teamsters,* 52 L.Ed.2d at 438. This will be an award of retroactive seniority from the date each would have or did apply for transfer or promotion.

## CONCLUSION

Our guidelines for the damage stage of this trial may be summarized as follows:

The class has not been decertified. For purposes of determining remedies, it will be divided into two subclasses, plaintiffs

with a seniority date prior to April 20, 1942, who remained train porters, and plaintiffs with a seniority date after April 20, 1942, who were demoted to chair car attendants.

We find Santa Fe has no financial liability to any plaintiff, having settled all monetary claims. Santa Fe does, however, have the responsibility to adjust its seniority system if required under the guidelines as follows:

1) All persons in the train porter subclass, if still active, are entitled to brakeman seniority as of the effective date of Title VII.

2) All persons in the chair car attendant subclass, if still active, are entitled to prove that each would have become a brakeman but for the discrimination of the Santa Fe.

3) To make such proof, each applicant must show:

a) the date he applied for transfer or promotion;

and

b) that he was physically qualified for the job.

4) To make such proof, each nonapplicant must show:

a) he would have applied for transfer or promotion, being willing to give up his February 7 Agreement protection and his chair car attendant seniority, and would have been willing to begin at the bottom of the brakeman seniority roster;

b) the date he would have applied for transfer or promotion under these conditions; and

c) that he was physically qualified for the job.

5) Each subclass member meeting the requirements of 3) or 4) is entitled to the presumptions.

a) that he was able to perform the job functions of a brakeman; and

b) that a vacancy for a brakeman existed at the relevant time.

The UTU also have to adjust seniority lists as set out herein.

The UTU is liable for appropriate attoneys' fees and for any additional monetary loss suffered by the train porter subclass members over and above the Santa Fe settlement when, if and as established in accordance with the following formula:

1) Determine the average compensation paid a white brakeman with seniority as of July 2, 1965, until the date the subclass member could no longer work;

2) Subtract the actual compensation paid the class member;

3) Subtract the amount received by the class member from the Santa Fe; and

4) Add interest at the legal rate from July 2, 1965.

The Court will not appoint a special master to make remedy computations, feeling such to be unnecessary. These matters should be obtainable by Santa Fe from its records, and there are not a large number of persons involved.

This Memorandum is designed to apprise the parties and their counsel of the Court's intentions as to remedies. To expedite the remedial stage of this action, we order that this matter be set down for hearing on January 2, 1979 at 1:30 P.M. at Wichita, Kansas.

IT IS SO ORDERED.

At Wichita, Kansas this 23rd day of October, 1978.

/s/ Wesley E. Brown
United States District Judge

## FOOTNOTE

[1] Back pay may not accrue prior to two years of filing with the EEOC. 42 U.S.C. § 2000e-5(g). This may not be earlier than the effective date of Title VII. All persons in the class will be entitled to the same starting date, even though some may not have filed complaints with the EEOC or filed complaints at a later time than the named plaintiff Joe Vernon Sears, since in a class action it is not required that every plaintiff exhaust administrative remedies. See *Albemarle, supra n. 8.* We see no reason to decertify the class, as the UTU suggests, since to do so would only deprive plaintiffs of this protection and of the presumptions they are entitled to as a result of our finding that defendants are liable for violating the Act.

United States Court of Appeals,
Tenth Circuit.

Nos. 78-1995, 78-1997 and 78-1998

Argued March 13, 1980

Decided March 11, 1981

Rehearing Denied in No. 78-1995

May 11, 1981

Joe Vernon SEARS, an individual, in person and for all other persons similarly situated,

Plaintiffs-Appellees and Cross-Appellants,

v.

Albert L. BENNETT, C. J. Skelton, Archie N. Jones, Forest D. Tollett, John W. Landrum, Lawson C. Spencer, Thomas H. White, Earlie Nash, Aubrey A. Robinson, Edward Rawlins, John W. Cole, Charles Majors, Jr., Jessee J. Smith, Paul H. Stewart, Jimmy E. Brown, Carl E. Chester, Ray E. Landrum, Raymond Willey, Elgie Crow and Ellis Johnson; Criscel Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey and W. W. Seymour,

Intervenors-Plaintiffs-Appellees and Cross-Appellants,

The BROTHERHOOD OF SLEEPING CAR PORTERS,

Plaintiff-Appellee and Cross-Appellant,

v.

The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, and United Transportation Union, successor to Brotherhood of Railway Trainmen, a labor organization,
Defendants-Appellants and Cross-Appellees.

Before SETH, Chief Judge, and HOLLOWAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The Atchison, Topeka & SAnta Fe Railway Company (Santa Fe) and the United Transportation Union (UTU)[1] appeal from a judgment holding that they violated the Civil Rights Act of 1964 (Title VII or the Act), 42 U.S.C. § 2000e *et seq.*, by perpetuating the effects of prior discrimination in a nonbona fide seniority system. Plaintiffs—black train porters, chair car attendants and their union—cross-appeal regarding elements of the back pay formula and showings required of individual class members by the court. The Equal Employment Opportunity Commission (EEOC) appeared as amicus on plaintiffs' behalf.

Plaintiff Joe Vernon Sears filed complaints against Santa Fe and UTU with the Kansas Commission on Civil Rights and the EEOC on March 8, 1966, and October 4, 1966, respectively, alleging that Santa Fe and the UTU had denied and were continuing to deny him and other black employees their rights under Title VII because of their race. On October 7, 1972, the EEOC notified Sears of his right to sue defendants; he filed suit in district court the following month on behalf of himself and

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[1] UTU is the successor by merger to The Brotherhood of Railroad Trainmen (BRT) and the Order of Railroad Conductors and Brakemen (ORC&B). UTU and its predecessors have represented brakemen and conductors of the Santa Fe as collective bargaining agents since at least 1892.

others similarly situated. The district court certified the suit under Fed.R.Civ.P. 23(b)(2) and (c) as a class action on behalf of Sears and all other black train porters employed by Santa Fe in any capacity from July 2, 1965 to the time of class certification. The Brotherhood of Sleeping Car Porters (BSCP)[2] was also admitted as a plaintiff. Santa Fe settled all claims for damages, back pay, and attorneys' fees with plaintiffs before trial, but remained a party in the suit for purposes of injunctive relief and seniority considerations.

With the parties' agreement, the court tried the case in phases and reported its findings in two decisions, one regarding liability, reported at 454 F.Supp. 158 (D.Kan. 1978), and the other dealing with damages (unpublished). The liability phase was tried by means of a joint presentation of stipulated facts, subject to objections of relevancy and materiality. The parties submitted briefs on the issue of damages, after which the court determined a method of arriving at back pay and seniority rights accruing to each member of the subclasses. It did not make individual awards, but retained jurisdiction to do so, finding it unnecessary to appoint a special master for the computation of back pay awards.

The issues on appeal are (1) whether the seniority system was bona fide within § 703(h) of the Act; (2) whether liability may be imposed on UTU for the impact created by the seniority system agreed to by UTU and Santa Fe; and (3) whether the court abused its discretion in its formulation of damages.

Some general background facts are in order. Train runs on the Santa Re traditionally included passenger trains, through freights, local freights, and mixed passenger and freight trains.

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[2] The BSCP merged with the "System Division" of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees effective April 1, 1978. The trial court recognized the change in party status, but continued to refer to the union as the BSCP, as we do here. *See* 454 F.Supp. at 160.

The train crews on local and through freight trains consisted of a conductor, head-end brakeman, rear-end brakeman, engineer and fireman. Santa Fe created the position of train porter in 1899. Train porters performed the duties of head-end brakemen on passenger trains and also attended to passengers and took care of the interior condition of passenger cars in their custody. Porters and head-end and rear-end brakemen on passenger trains received the same mileage rate or hourly rate from 1918 until termination of the job of train porter in 1975. However, brakemen received additional compensation not paid to train porters, such as pay for delays. Thus, the total wages paid to a passenger brake-man were higher than those paid to a train porter. Most passenger trains also carried chair car attendants, non-operational personnel who attended to passengers' needs and cleaned the interior of the cars. They performed no braking duties. Train porters and chair car attendants were always black males. Between 1918 and 1959, the entry level job with the Santa Fe for a black man was the position of chair car attendant. Chair car attendants could qualify for the position of a train porter by taking a rules examination, passing a physical examination, and completing student trips on passenger trains. The newly qualified train porter would continue to work as a chair car attendant and would work as a porter when called from the extra board, a list of qualified porters who were not assigned to a regular run. With sufficient seniority, he could obtain a regular job as a porter.

The entry level for a nonblack man was the brakeman position. A white man could qualify for the brakeman position by taking a rules examination, passing a physical examination, and completing student trips on local freight trains. The rules examination for a brakeman applicant and the administration thereof were the same as for train porters. Before 1960, a new hire started as an extra on all of the types of trains run by Santa Fe. After accumulating sufficient seniority, a brakeman could obtain a regular freight braking job. Generally a brakeman needed substantial seniority to obtain a regular braking job on

passenger trains. Some brakemen never sought passenger work. A brakeman on a passenger train could return to freight service by exercising his seniority rights.

The Santa Fe has always maintained and published seniority rosters for each craft for each district or geographic area. An individual's seniority date is the earliest date of continuous service in a particular craft within a particular district. An employee's seniority date determines promotion opportunities as well as his right to protect work within his craft and district. Seniority is not transferable from one district to another or from one craft to another. The first known contract containing seniority provisions was an 1892 agreement between Santa Fe and predecessors to UTU. In 1960, the seniority rosters of brakemen and yardmen were combined, giving them dual rights. After that date, a new hire was given a seniority date applicable to yard and road service.

A UTU predecessor, the Brotherhood of Railroad Trainmen (BRT), made several attempts to transfer braking duties from black train porters to white brakemen. BRT protested that the use of porters on passenger trains to perform the duties of head-end brakemen violated the contracts between the BRT and Santa Fe providing for the seniority rights and duties of brakemen. In 1959, the National Railroad Adjustment Board issued Award 19324, holding that only train porters holding a seniority date prior to April 20, 1942, could perform head-end braking duties. All train porters with a later seniority date were demoted to chair car attendants and could no longer perform braking duties.

In the instant case, the district court divided the plaintiff class into two subclasses: (1) those who were serving as train porters in 1965 when Title VII became effective and (2) those who had been reclassified as chair car attendants under Award 19324 and were serving in that capacity on July 2, 1965. The first group is composed of employees who had a seniority date earlier than April 20, 1942, and thus were allowed to continue in the porter

position after Award 19324. Those in the second group once served as porters but had a seniority date after April 20, 1942, and thus were precluded from serving as train porters after 1959.

The district court held that both Santa Fe and the UTU engaged in a pre-Act system-wide policy and pattern of discrimination against black employees, that this discrimination was perpetuated by the seniority system agreed to by both defendants, and that disparate impact created by the seniority system was not immunized by the § 703(h) exemption for bona fide seniority systems. The court also found that Santa Fe violated the Act by refusing to promote class members after the effective date of Title VII. The court imposed liability on UTU as well as on Santa Fe for the disparate impact of the seniority system on the porter subclass, reasoning that the union's role in creating and maintaining the seniority system was at least as great as the employer's. Although both defendants were deemed responsible for this discrimination, UTU alone was held liable for monetary damages and attorneys' fees because Santa Fe had settled with plaintiffs. (Damages due each class member were to be reduced by the amount received from the Santa Fe settlement.) Santa Fe alone was held liable with regard to the discrimination against the chair car attendant subclass because the court found UTU engaged in no post-Act discriminatory conduct against them. The district court noted that only those plaintiffs still actively employed would benefit from a seniority award; it has not determined whether any plaintiffs are so employed.

## I. LIABILITY

At the outset, we note that in a case tried on stipulated facts, as this one was, in which the observation of witnesses played no role in its findings, we evaluate and draw conclusions from the evidence without the deference ordinarily afforded a trial court's findings of fact. *Mid-Continent Casualty Co. v.*

*Everett,* 340 F.2d 65, 70 (10th Cir. 1965). While the scope of our review is enlarged somewhat in such a case, the ordinary standard of review still inheres: findings of the trial court are set aside only if they are clearly erroneous. *Id.*

Plaintiffs claim that Santa Fe and UTU violated the Civil Rights Act of 1964 by perpetuating the effects of prior discriminatory conduct of employing blacks as train porters and chair car attendants and excluding them from employment opportunities in the higher paying jobs of brakeman and conductor. Section 703(a) of Title VII, 42 U.S.C. § 2000e—2(a) provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The district court held that plaintiffs met their burden of showing that racial discrimination was standard operating procedure for Santa Fe and UTU and its predecessors for nearly a century, carrying over past the effective date of Title VII through operation of the seniority system. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396 (1977).

> "The evidence is clear. For almost all the years of the Twentieth Century to date, there have been no black

> brakemen, no white train porters. Both positions required the performance of substantially similar braking duties; the difference in additional duties is insignificant compared to the similarity of total duties. The fact is that employees performing essentially the same duties were segregated into job category by race, and the evidence is overwhelming that such segregation was intentional. This is disparate treatment."

454 F.Supp. at 174. We will not restate the evidence supporting this conclusion. It is well summarized in the trial court's opinion, 454 F.Supp. at 162-73, and the findings are amply supported by the record.

Santa Fe apparently concedes its liability for post-Act discriminatory hiring practices. Both Santa Fe and UTU argue that the only wrong involved here is merely discriminatory hiring practices. We disagree. Consideration of the validity of the seniority system is crucial to establishment of seniority rights of class members and to the liability of UTU for damages and back pay. The validity of the seniority system is at issue because that system perpetuated past discrimination. Both Santa Fe and UTU argue that the seniority system is valid under the rationale of *Teamsters.*

### A. *The Seniority System*

The Civil Rights Act prohibits practices or procedures that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.,* 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). The district court found that the seniority system agreed to by Santa Fe and UTU perpetuates the effects of pre-Act discrimination and thus violates Title VII by creating a disparate impact disfavoring plaintiffs. 454 F.Supp. at 174.

The operation of the seniority system complained of in this case is similar to that at issue in *Teamsters.* There minority

drivers proved that a carrier of motor freights had engaged in a pre-Act pattern of discrimination by hiring minority applicants in serviceman or local driver positions rather than in the higher paying (long distance) line driver positions. The effects of this pre-Act discriminatory hiring were perpetuated by the seniority system embodied in the collective bargaining agreement between the drivers' union and the employer, which required employees who transferred to line driver positiosn to forfeit seniority accumulated in a serviceman or local driver position. The Supreme Court found the seniority system created a disparate impact and would have been violative of the Civil Rights Act but for § 703(h) of the Act which exempts bona fide seniority systems from the operation of the Act under certain circumstances.[3] The Santa Fe system requires the same sort of seniority forfeiture by porters and chair car attendants transferring to a brakeman position, and thus creates a disparate impact by perpetuating the effects of pre-Act discrimination. *See Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861; *Griggs v. Duke Power Co.,* 401 U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971). Thus, the crucial question in the instant case is whether the seniority system at issue is immunized by § 703(h).

In *Teamsters,* the Supreme Court reasoned that in passing § 703(h) Congress intended "to make clear that the routine ap-

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[3] In relevant part, § 703(h), 42 U.S.C. § 2000e-2(h) provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, *provided that such differences are not the result of an intention to discriminate* because of race, color, religion, sex, or national origin . . . ."

(Emphasis added.)

plication of a bona fide seniority system[4] would not be unlawful under Title VII," despite the fact that it perpetuates the effects of pre-Act discrimination. 431 U.S. at 352, 97 S.Ct. at 1863 (footnote added). The Court recognized that the proviso to § 703(h) requires that any differences in treatment created by the system must not be the "result of an intention to discriminate because of race ... or national origin." *Id.* at 353, 97 S.Ct. at 1863. In considering the *Teamsters* seniority system, the Court indicated some of the circumstances that influenced its determination that the bona fides required by § 703(h) were met in that case.

> "The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-sur-named Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful."

431 U.S. at 355-56, 97 S.Ct. at 1864-65 (Footnote omitted).

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[4] The court used the term bona fide seniority system to refer to a system within the § 703(h) exemption.

Relying on a Fifth Circuit distillation[5] of factors from the foregoing *Teamsters* statement, the district court held that Santa Fe's seniority system met the first two factors considered by the Supreme Court but failed to meet the final two requirements because the system "had its genesis in racial discrimination and was created and maintained with illegal purpose." 454 F.Supp. at 179. Both defendants urge us to reverse the district court's holding of liability on the ground that the system is bona fide under *Teamsters*. While plaintiffs do not challenge the court's liability holding on appeal, they contend that, unlike the *Teamsters* system, this one was not rational and did not apply equally to the races involved as required by the *Teamsters* test. We agree with the district court's ultimate determination that the system is not within the protection of section 703(h), but our analysis differs somewhat from that of the district court.

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[5] In *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 787 (1978), the Fifth Circuit interpreted the statement of criteria from *Teamsters*.

> "As we read the *Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide ... The Court's analysis suggests that the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue ... In *Teamsters* the Court focused on four factors:
>
> 1) whether the seniority system opreates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system had its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose."

*Id.* at 351-52, 97 S.Ct. at 1862-63.

Although the district court noted that the seniority system was not neutral in operation, it found the seniority system met the first factor of *Teamsters* because it is neutral on its face, applying equally to all individuals. "No transferee to a brakeman position, black or white, would accrue seniority any differently than any other transferee." 454 F.Supp. at 179. The Supreme Court's explanation of the first factor in *Teamsters* focused on the impact of the system on the racial groups involved, indicating that facial neutrality of operation of the system is not determinative. The entire statement of the first factor considered by the Court follows:

> "The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. *The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-sur-named Americans; to the contrary, the overwhelming majority are white. . . .*"

431 U.S. at 355-56, 97 S.Ct. at 1864-65 (emphasis added). In *Teamsters,* the Supreme Court assessed the racial composition of the city drivers and servicemen. We believe the comparat group for consideration here is that portion of the train crew performing related jobs, composed of conductors, brakemen, porters, chair car attendants and switchmen. In 1960, the seniority lists of brakemen and switchmen were merged or "dualized" to allow movement between these "similar" crafts. This merger allowed all members of this operational crew—except porters and chair car attendants—to transfer without a loss of seniority. In dramatic contrast to *Teamsters, all* the employees in the relevant group "who are discouraged from transferring" are blacks. Thus, the seniority system here fails to meet the first criterion of *Teamsters.*

In regard to the second factor, the district court determined that the structure of separate crafts for porters, chair car attendants, and brakemen was "rational, in accord with industry practice, and consistent with Railway Labor Act [RLA]

precedents," 454 F.Supp. at 179. The craft units have been recognized by the Railway Labor Board and were obviously in accord with prevailing industry practice. We believe the creation of the porter and chair car attendant crafts was not rational because they were drawn along racial lines. The district court stated that the *Teamsters* court refused to invalidate a system which involved "the separation into two crafts by race." *Id.* But the Teamsters craft units were not drawn totally on racial lines. The majority of Teamsters drivers in all crafts were white; here 100% of all members of the porter craft are black. Second, two of the crafts, those of porter and brakeman, under consideration here performed the same functions.[6] Finally, we cannot agree with Santa Fe's argument that the Supreme Court recognized the rationality of the craft designations in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952). That issue was not before the Court in *Howard*.[7]

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[6] While defendants now contend that the positions are not substantially similar, the basis for UTU's protests before the Railway Labor Board was that the porters were performing duties given to brakemen by the seniority agreement, *i.e.*, that the two crafts performed the same function. *See also Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 771 n.3, 72 S.Ct. 1022, 1024 n.3, 96 L.Ed. 1283 (1952) quoted *infra* note 11.

[7] Rather than ratifying the craft designations, the *Howard* Court implied the specious nature of the distinctions between the porter and brakeman crafts.

> "Since the Brotherhood has discriminated against 'train porters' instead of minority members of its own 'craft,' it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. . . .
>
> "As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name."

343 U.S. 768, 773, 72 S.Ct. 1022, 1025, 96 L.Ed. 1283 (1952).

The third factor mentioned in *Teamsters* is whether the seniority system had its genesis in racial discrimination. The brakemen's system was established in 1892, before the creation of the porter or chair car attendant crafts, in a "period when segregation was the standard operation procedure on the Santa Fe." 454 F.Supp. at 180. In this context the seniority system for brakemen may have originated without conscious regard to race, but the same may not be said of the later establishment of the black-only crafts.

The fourth and final factor is whether the system was maintained for a discriminatory purpose. The system was used as a sword by the union in its efforts to take plaintiffs' jobs from them. 454 F.Supp. at 180. Black men were not accepted as members in the brakemen's union. Beginning not later than 1920, the union sought the transfer of braking duties from black train porters to white brakemen, protesting that negotiated contracts between the BRT and Santa Fe provided that the brakeman with the highest seniority would perform the next available braking duty, and that by allowing porters to perform braking functions Santa Fe was violating those agreements. Ultimately, the National Railroad Adjustment Board held that only those train porters holding a seniority date prior to April 20, 1942, could perform front-end braking duties. All train proters with seniority dates subsequent to April 20, 1942, were demoted to chair car attendants. The evidence clearly supports the holding that the system was maintained for a racially discriminatory purpose.

The existence of an all-white work force, even if created through discrimination, will not invalidate a seniority system protected under section 703(h). *See Teamsters,* 431 U.S. at 350-51, 97 S.Ct. at 1862-63. But protection of that section is not extended to a system, such as this one, which creates employment differences with the intention of discriminating because of race. In sum, the brakeman's seniority system does not fall within the exception created by Congress in section 703(h)

because it does not apply equally to all races, because it was not based on a rational craft delineation, and because it was maintained with the purpose of discriminating against black employees. As the Supreme Court recognized in *Teamsters,* liability is imposed on those responsible for a seniority system that is not protected by section 703(h) and that perpetuates the effects of Pre-Act discrimination. 431 U.S. at 349-50, 97 S.Ct. at 1861-62. In this case, Santa Fe is clearly liable. Since it has settled monetary claims, however, Santa Fe is affected by this holding only with respect to its future practices and the seniority relief granted to members of the subclasses still working for it.

B. *Union's Liability*

The district court predicated UTU's liability on § 703(c) of Title VII, which provides, in pertinent part: "It shall be an unlawful employment practice for a labor organization . . . (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c). UTU contends that even if the seniority system is invalid under section 703(h), the union cannot be held liable. The essence of its arguments can be summarized as follows: (1) UTU exercised no hiring or transfer authority; (2) UTU did not influence Santa Fe's hiring policies and used only lawful means to protest the assignment of braking tasks to porters; (3) UTU owed plaintiffs no duty of representation.

At trial, the parties stipulated that UTU had no hiring authority. 454 F.Supp. at 167. UTU contends that its lack of legal hiring or transfer authority is determinative.[8] Obviously,

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[8] On this point, UTU stated in its brief that it is "inconceivable that UTU could be held liable for pre-Act discrimination while it was properly found to be not liable for post-Act discrimination." UTU Brief 14. The district court stated that "UTU has no liability for post-Act discriminatory conduct, for it neither had nor exercised any hiring and transfer authority, and therefore did not engage in any employment conduct which affected plaintiffs." 454 F.Supp. at 182. We believe

lack of authority to hire or transfer is not determinative on the issue whether the union violated § 703(c). That section proscribes the indirect role of encouraging discrimination by an employer, by making it an unlawful hiring practice for unions to "cause or attempt to cause an employer to discriminate."

UTU argues that because the railroad was not a closed shop until 1965, its white membership requirement (removed in 1960) did not deter blacks from applying for brakeman positions or influence Santa Fe's hiring policies. Separately, UTU contends that its efforts to take braking duties from porters were simply "lawful resort" to administrative agencies to regain the disputed head-end braking duties, claiming that "[n]owhere in the record is there anything to support even an inference that on the Santa Fe UTU demanded that blacks be hired only as Chair Car Attendants or Train Porters." UTU Brief 22.

We find these arguments unpersuasive. The net effect of UTU's actions was that it gained control of most braking work, and it allocated the work to its white members only. We agree with the district court's holdings that UTU's role in creating the invalid seniority system was at least as great as Santa Fe's, 454 F.Supp. at 180, and that the discrimination perpetuated by the seniority system "was approved by, acquiesced in, and maintained and demanded by the 'white' unions." 454 F.Supp. at 174. A union's role as a party to a collective bargaining agreement may be sufficient to impose back pay liability on the union. *See Kaplan v. International Alliance of Theatrical and Stage Employees,* 525 F.2d 1354, 1360 (9th Cir. 1975); *Johnson*

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that the court meant merely that plaintiffs had failed to make out a case of post-Act discriminatory conduct. The statement obviously cannot mean that liability is imposed under Title VII only for discriminatory hiring practices. A few pages earlier the court found UTU liable under § 703(c) for the disparate impact created by Santa Fe's pre-Act discrimination though the union clearly had no hiring authority.

*v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (5th Cir. 1974). We hold that these actions were at least an attempt to cause the employer to discriminate against plaintiffs and, therefore, violated § 703(c).[9]

The fact that UTU was the bargaining agent for brakemen and not for proters does not change the result. While the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, empowers unions to act as the exclusive bargaining agent for those it represents, it in no way immunizes a union's discrimination. Bargaining agents may not use their power to discriminate against the non-union or minority members of the craft they represent, *Steele v. Louisville & Nashville RR.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), or against minority employees in other craft designations. *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 775, 72 S.Ct. 1022, 1026, 96 L.Ed. 1283 (1952).[10] Moreover, liability here is premised on the Civil Rights Act not on the RLA. While Title VII did not invalidate the RLA, it proscribes discriminatory conduct not dealt with and not immunized by the RLA.

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[9] It is unnecessary for us to find that the union entered the agreement with the intention of discriminating. The action of agreeing to the seniority system was nonaccidental and deliberate. We conclude that the union "intentionally engag[ed] in an unlawful employment practice" within the meaning of 42 U.S.C. § 2000e-5(g). *See Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970).

[10] The facts of *Howard* are strikingly similar to those of the instant case. By threatening a strike, the Brotherhood of Railroad Trainmen forced a railroad to agree not to permit train porters to perform any braking duties. 343 U.S. at 771, 72 S.Ct. at 1024. Although the agreement, like the seniority provisions obtained by the same union in the present case, "did not in express words compel the discharge of 'train porters,' the economic unsoundness of keeping them after transfer of their 'brakeman' functions made complete abolition of the 'train porter' group inevitable." *Id.* Although the RLA lacks specific references to discriminatory conduct or the broad equitable powers of Title VII, the Supreme Court held the RLA prohibits the "bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." *Id.* at 774, 72 S.Ct. at 1025.

Thus, the union's role in freezing the status quo of a prior discriminatory seniority system, not immunized under section 703(h), renders it liable to those upon whom the seniority system had an adverse impact.

The trial court gave relief against the union only to the train porter subclass, denying relief to the chair car attendants. It reasoned that the impact of the seniority system "is upon those class members who performed braking duties but did not accrue braking seniority, *i. e.,* persons employed as train porters." It also stated that because plaintiffs employed as chair car attendants at the effective date of the Act "were not performing braking duties, they had no right to accumulate brakeman seniority and the invalid seniority system had no discriminatory impact upon them." Plaintiffs argue that all class members, porters and chair car attendants alike, suffered the same disparate impact of a restriction of employment opportunities and thus all are entitled to the same relief. Defendants support the district court's denial of recovery to chair car attendants, but assert that the award to the porter subclass was improper because the porter position was not substantially similar to the brakeman position.

We agree with the district court that the union is liable in damages to the porters. Notwithstanding defendants' assertions, the porters were Santa Fe employees performing braking functions essentially like the nonblack brakemen.[11] These

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[11] The positions of porter and brakeman were compared to each other by the Supreme Court in *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952).

> "In addition to doing all the work done by ordinary brakemen, train porters have been required to sweep the coaches and assist passengers to get on and off the trains. As the Court of Appeals noted, 'These aisle-sweeping and passenger-assisting tasks, however, are simply minor and incidental, occupying only, as the record shows, approximately five per cent of a train porter's time.' "

*Id.* at 771 n.3, 72 S.Ct. at 1024 n.3 (quoting *Howard v. St. Louis-San Francisco Ry. Co.,* 191 F.2d 442, 444 (8th Cir. 1951)).

porters were not denied the job, instead they were denied the title of brakeman, extra pay accruing to that position, and the opportunity for further employment advancement. These results were perpetuated into the post-Act period by the invalid seniority system. The union is liable because it helped perpetuate this discrimination. *See Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861. If the craft distinction between proters and brakemen is ignored as invaled, the union has a duty not to use its power to discriminate against non-union or minority members of the craft. *Steele v. Louisville & Nashville Ry.*, 323 U.S. at 192, 65 S.Ct. at 226. If the craft distinctions are credited, the union, nevertheless, has a duty not to discriminate against minority employees in the other craft designations. *See Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. at 774, 72 S.Ct. at 1025.

The chair car attendant's position is different in some respects, but we hold that UTU is liable to this subclass also. The difference is that as of the effective date of Title VII these men were not performing braking functions. The Union argues that the chair car attendants were a separate craft, not represented by UTU or its predecessors under the craft-type organization in effect in the railroad industry. All of this is true, but the chair car attendants were victims of the invalid seniority system, in the perpetuation of which the union played a major role. During all of the pre-Title VII years the entry level job on the Santa Fe for a black outside the Silsbee, Texas, district was as chair car attendant. Until 1959 a black could work up to the porter position, where he could perform a brakeman's functions and receive somewhat comparable pay. The entry level job for a white was as brakeman. The union helped perpetuate the discrimination by imposing all white membership rules until 1960, and by seeking and succeeding in obtaining demotion for these class members from the position of porter to chair car attendant. All members of this subclass qualified and served as train porters until demoted in 1959.

After 1960, brakemen and switchmen operated under merged seniority rosters. We understand they could be promoted to conductor and could work in that position without losing seniority as brakemen-switchmen. But members of the subclass of chair car attendants were frozen into their position. No one could be promoted to porter. There was no merger of porter or former porter chair car attendants seniority rosters with those of the brakemen-switchmen, nor any right, as we understand, to retain seniority in the old job if a brakeman's position was sought. This situation continued in the post-Act period under contracts negotiated between UTU and Santa Fe. The system discouraged application for the better paying brakemen's positions.

*Teamsters* said

> "One kind of practice 'fair in form, but discriminatory in operation' is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs:* 'Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.' 401 U.S., at 430 [91 S.Ct. at 853].
>
> Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very

> real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.' "

431 U.S. at 349-50, 97 S.Ct. at 1861-62 (footnote omitted).

Labor unions as well as employers may be held liable for the perpetuation of prior discrimination through their role in negotiating collective bargaining agreements. *E. g., Kaplan v. International Alliance of Theatrical and Stage Employees,* 525 F.2d 1354 (9th Cir. 1975); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C. Cir. 1973). Thus the trial court erred in not holding UTU liable in damages to the chair car attendant subclass.

## II. REMEDIES

### A. *Train Porters*

The district court held that "all members of this [porter] subclass are presumptively entitled to accrue brakeman's seniority and pay as of July 2, 1965," the effective date of the Act.[12] The court set the following formula to be used in figuring UTU's liability for back pay due each porter:

> "1) Determine the average compensation paid a white brakeman with seniority as of July 2, 1965, until the date the plaintiff could no longer work.
>
> 2) Subtract the actual compensation paid the class member.
>
> 3) Subtract the amount received by the class member from the Santa Fe settlement.

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[12] The Act limits an award of back pay by providing that no award may accrue more than two years before the filing of a claim with EEOC. Sears filed his claim with EEOC on October 4, 1966. Since no award may be made retroactive to the Act, Sears' filing date entitles him and other members of the class to an award accruing from the effective date. *See Teamsters,* 431 U.S. at 356-57, 97 S.Ct. at 1865.

4) Add interest in the legal rate from July 2, 1965."

Order of October 23, 1978, at 9.

Plaintiffs assert that damages for this subclass should be computed using the average wages earned by a brakeman with sixteen to seventeen years of experience rather than being based on a brakeman with a seniority date of July 2, 1965. The trial court rejected that argument on the grounds that it would constitute an award retroactive to the Act. UTU attacks the use of the averate brakeman's salary in the award formula, arguing that the inclusion of the freight brakeman salary in the average is improper because porters did not perform freight work. The district court included the salary of freight brakemen in the formula because

> "it would be difficult to determine at this late date what each subclass members [sic] would have done in terms of making bids for positions. The chain of events cannot be reconstructed. By using averages, those high-paying and low-pay positions will be combined.... We think these class members are entitled to presume that there would have been opportunities for them to bid their seniority the same as white brakemen with similar seniority."

Order of October 23, 1978, at 8.

Under Title VII the trial court has wide discretion in fashioning remedies to make victims of discrimination whole. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975); *United States v. Lee Way Motor Freight, Inc.,* 625 F.2d 918, 949 (10th Cir. 1979). This Court will vary the district court award only when that court has abused its discretion. *Stone v. D. A. & S. Oil Well Servicing, Inc.,* 624 F.2d 142, 144 (10th Cir. 1980). Clearly back pay and seniority are suitable remedies well within the broad discretion of the trial court.

Nevertheless, we hold the trial court was incorrect in its belief that to grant back pay as if the porters had pre-Act seniority would violate the Act. The remedy fashioned by the court should represent a reasonable attempt to restore the victims of discrimination to a position where they would have been absent the unlawful impact of the seniority system. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). If the court, in its attempt to carry out the "make whole" purposes of the act, assumes that a typical employee might have bid freight service as well as passenger service, we think it should also consider such an employee's typical length of service with Santa Fe in formulating an award. Such a formulation does not seem to us to constitute an award of seniority. An award of actual seniority is not an issue as to this subclass, because the last train porter working for the Santa Fe retired in 1975. Stipulation # 40. *See Teamsters,* 431 U.S. at 354-55, 97 S.Ct. at 1864-65. Recognition of the length of service of the employees in this subclass would merely reflect the level of pay they would have received absent discrimination. Moreover, no fictional seniority is involved; these are employees of Santa Fe who have done braking work for many years. Alternatively, in this situation a way of making the discriminatees whole would be to limit the comparison to the wages of brakemen who performed only passenger work, as that is the work actually done by these porters. With this concept of equal pay for equal work, seniority would not be a factor.

Although we recognize most passenger train brakemen have considerable seniority, as did these porters, we will not dictate to the trial court which alternative to choose. The court of appeals' duty is to require a "consistent and principled application of the back pay provision, consonant with the twin statutory objectives [to eradicate discrimination and make sufferors whole], while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Id.* 422 U.S. at 421-22, 95 S.Ct. at 2373-74.

B. *Chair Car Attendants*

The trial court limited relief to the chair car attendant subclass to awards of seniority, because Santa Fe settled monetary claims prior to trial and because it held UTU was not liable for post-Act discrimination. We have already found the union liable to this subclass. Under normal circumstances we would simply remand to the district court so that it might formulate a proper remedy. But it has already treated aspects of the remedy, considering seniority rights this subclass has against Santa Fe. Therefore, it seems appropriate to review the trial court's analysis on this issue and to provide guidance for the trial court.

In formulating back pay for the members of the chair car attendant subclass, different considerations apply than to the porter subclass. This is not a situation of equal pay for equal work; these individuals were not performing brakemen's duties on the effective date of Title VII. We think a proper back pay award against the union might treat the individuals as new hires without previous seniority, from and afte the date they did or would have applied to become brakemen.

In formulating remedies for post-Act discriminatory refusals to promote, the district court here divided the subclass of chair car attendants into two groups: those who applied for the position of brakemen and those who did not apply for that position. Order of October 23, 1978, at 10. In order to take advantage of the presumptions that he was able to perform the job functions of a brakeman and that a vacancy for a brakeman existed at the relevant time, the district court required each applicant to establish the date he applied for transfer or promotion and that he was physically qualified for the job. The proof required of each nonapplicant was that:

> "a) he would have applied for transfer or promotion, being willing to give up his February 7 [1966] Agreement protection and his chair car attendant seniority, and would

have been willing to begin at the bottom of the brakeman seniority roster;

b) the date he would have applied for transfer or promotion under these conditions; and

c) that he was physically qualified for the job."

Order of October 23, 1978, at 16.

We agree that a nonapplicant should show when he would have applied. The *Teamsters* court said

> "To conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however, from holding that nonapplicants are always entitled to such relief. A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that *he would have applied for the job had it not been for those practices.* When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the [same] presumption...."

431 U.S. at 367-68, 97 S.Ct. at 1870-71 (emphasis added).

We believe, however, that a member of the subclass who actually applied to become a brakeman should be allowed to show that he would have applied sooner (no earlier than July 2, 1965) had it not been for the unlawful discriminatory practices by defendants. To hold otherwise favors one who never challenged the system over one who, after delay, mustered the courage to make actual application.

Also, those who show they would have applied before February 7, 1966, should not be required to demonstrate they would have been willing to give up the job protection of the

February 7 agreement. Until that time they had no protectable agreement right to give up. Also, as to those individuals, they should not be required to show they would have given up their chair car attendant's seniority. Until the February 7 agreement the chair car attendants had no collective bargaining agreement giving them seniority protection.

Affirmed in part, reversed in part. The case is remanded for further proceedings consistent with this opinion.

MAY TERM - MAY 11, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 78-1995
No. 78-1997
No. 78-1998

Joe Vernon Sears, et al.,
Plaintiffs-Appellants
Cross-Appellees,

vs.

The Atchison, Topeka & Santa Fe Railway Company, et al.,
Defendants-Appellees
Cross-Appellants.

Equal Employment Opportunity Commission,
Amicus Curiae.

This matter comes on for consideration of the petition of United Transportation Union for rehearing and suggestion for rehearing en banc in the captioned cases.

The Court has for consideration a motion of appellant/cross-appellee, the Brotherhood of Sleeping Car Porters, for issuance of the mandate. The Court also has appellees/cross-appellants' bill of costs.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

The Court further orders that the mandate in these cases shall issue seven (7) days after the entry of this order in accordance with Rule 41, Federal Rules of Appellate Procedure.

The appellee/cross-appellants' bill of costs is ordered filed as of March 26, 1981, and the Clerk is directed to prepare a statement of costs in accordance therewith for insertion in the mandate in these cases.

HOWARD K. PHILLIPS
Clerk

/s/ By: Robert L. Hoecker

In The United States District Court
For The District Of Kansas

Civil Action No. W-4963

Joe Vernon Sears, an individual, in person, and for all other persons similarly situated,
Plaintiffs,

and

The Brotherhood of Sleeping Car Porters,
Intervenor-Plaintiffs,

vs.

The Atchison, Topeka and Santa Fe Railway Company and United Transportation Union, successor to Brotherhood of Railway Trainmen, a labor organization,
Defendants.

**ORDER**

Filed July 22, 1981

NOW, on this 1st day of June, 1981, the above captioned matter came on for hearing pursuant to this Court's Order for suggestions from the Parties herein as to the proper method to implement the Opinion and Judgment of the United States Court Of Appeals For The Tenth Circuit. Plaintiff and Class Members appear by and through their attorneys, Terry G. Paup, of Wichita, Kansas and Lee H. Woodard of Woodard, Blaylock, Hernandez, Pilgreen, & Roth of Wichita, Kansas. Intervenors, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, W. W. Seymour and Criscell Kemp, and the Brotherhood of Sleeping Car Porters appear by and through their Attorney, Chester I. Lewis, of Lewis, Davis and Mitchell, of Wichita, Kansas.

Defendant, The Atchison, Topeka and Santa Fe Railway Company, appears by and through its Attorneys, Shelly J. Venick, of Chicago, Illinois, and Thomas R. Conklin, of Topeka, Kansas. Defendant, United Transportation Union, appears by and through its Attorneys, William Sitzer, of Dubail, Judge, Kilker, O'Leary & Smith, of St. Louis, Missouri, and E. Lee Kinch, of Ratner, Mattox, Ratner, Ratner & Barnes, of Wichita, Kansas. There are no other appearances.

THEREUPON, the Court, having examined the file herein, reviewed the United Transportation Union's Proposal For Implementation of the Tenth Circuit's Opinion and Judgment, the Proposal To Implement Judgement of the Atchison, Topeka and Santa Fe Railway Company and the Plaintiffs' and Class Members' Proposals and Supplements to Proposals To Implement Judgment filed herein, heard arguments and comments of counsel relative to the proposed form giving notice of Class Action Relief to all Class Members herein and the proposed claim form for all Class Members herein. Following the adoption of certain amendments to proposals submitted to the Court, the Court approved Exhibits "1" through "6" attached hereto and incorporated herein and directed that an appropriate copy of same be sent to all Class Members.

THEREUPON, the Court, having heard arguments and statements of counsel regarding the proposed formula for computation of back pay and the assimilation and collection of data relative thereto, directed that counsel for the parties herein should endeavor to select two (2) representatives brakeman and conductor seniority districts from Santa Fe's Eastern and Western Lines to compute the average wage of a brakeman who was hired on or before 1945 by taking a representative sample from each said seniority district of not less than ten (10) such individuals in order to determine that aspect of the back pay formula for Train Porter Subclass Members. The Court, thereupon, deferred its ruling upon this aspect of the back pay formula for Chair Car Attendant Subclass Members.

THEREUPON, the Court heard arguments and statements of counsel regarding the procedural framework for the adjduation of Class Member's carryover seniority and back pay claims. Having been fully advised, the Court found that all Class Members, should be mailed a written notice and a claim form forthwith. Exhibits "1" through "6" hereto should be sent to each living Class Member herein by certified mail, addressee only, with return receipt requested to their last known address. In the case of a deceased Class Member, such notice and claim form should be directed in the same manner to the executor of his estate, his wife, or his immediate next of kin. All Class Members shall be allowed a period of forty-five (45) days following the receipt of said notice and said claim form to file a verified claim with the Clerk of this Court and all claims should be submitted under oath or in the form of an affidavit as is set forth in Exhibits "1" through "6", inclusive. Any Class Member not so notified should be located by counsel for the Plaintiff through the help of other Class Members, friends or relatives and notified thereafter in the same manner. The Court further finds that the defendants, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and the UNITED TRANSPORTATION UNION will be required to accept each such claim as filed or to file an objection thereto and state, under oath, their specific dispute relative thereto, listing all evidence in support of their objection, ie. documents and witnesses and set forth the substance of their proposed proof. Any such objection should be filed within thirty (30) days of the filing of such claim or said claim will be deemed accepted as filed. Within thirty (30) days following the receipt of any such objection to any such Class Member's claim, Counsel for Plaintiffs will file a list of all witnesses and exhibits supporting such Class Member's claim and notify the Court as to the issues outstanding between the parties, as well as whether the proposed witnesses are physically or economically able to appear before the Court or schedule the necessary depositions and so apprise the Court. Counsel for Plaintiffs are directed to assist,

in any reasonable manner, all Class Members or any attorney representing any Class Member in the filing of such claims. Within sixty (60) days following the receipt by the Clerk of this Court of all claims and all objections thereto, counsel for all parties herein will submit a jointly prepared schedule of all matters in dispute to the Court and an estimated time for the adjudication of same so that the Court can schedule the matter for hearing at the earliest practical date.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that all Class Members herein should be given written notice of this action and the opportunity to file a claim herein. Exhibits "1" through "6" attached hereto and incorporated herein are approved for this purpose and counsel for Plaintiffs are directed to mail an appropriate copy of such notice and such claim form to all Class Members by certified mail, addressee only, with return receipt requested as soon as practical. An appropriate copy of such notice and such claim form should be mailed, in the same manner, to the Executor of the Estate, the wife, or the next of kin of all deceased Class Members.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each such Class Member of the Executor of the Estate, the wife, or the next of kin of any deceased Class Member shall be allowed a period of forty-five (45) days following the receipt of said notice and said claim form to file a verified claim with the Clerk of this Court and all such claims shall be submitted under oath or in the form of an affidavit. Within thirty (30) days following the filing of any such claim the defendants, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and UNITED TRANSPORTATION UNION shall file all objection to such claim and state, under oath, in such objection their specific dispute relative to such claim, listing all evidence in support of said objection (ie. documents and witnesses) and set forth the substance of their proposed proof. Should said Defendants fail or neglect to file

such objection with thirty (30) days of the filing of a claim, such claim shall be deemed to be accepted by said Defendants as filed. Within thirty (30) days following the receipt of any objection to any claim, Plaintiffs' counsel will file a list of all witnesses and exhibits supporting such Class Member's claim and notify the Court as to the issues outstanding between the parties relative to such claim as well as whether or not the proposed witnesses listed are physically or economically able to appear before the Court or schedule the necessary depositions and so apprise the Court. Within sixty (60) days following the receipt by the Clerk of this Court of all claims and all objections thereto, counsel for all parties herein will submit a jointly prepared schedule of all matters in dispute to this Court as well as an estimated time for the adjudication of same so that the Court can schedule the matter for hearing at the earliest practical date.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the formula for the computation of the back pay relief to Train Porters Subclass Members shall incorporate the average wage from and after July 2, 1965, for a Santa Fe brakemen-conductor who had been employed in such capacity since on or before 1945. Said average shall be determined by taking the average wage for at least ten (10) such brakemen to determine the compensation against which the Train Porter Subclass Member's actual compensation is compared. In this regard counsel for parties herein are hereby directed to select two (2) representative brakemen and conductors seniority districts from Santa Fe's Eastern and Western Lines from which a representative sample of not less than ten (10) such brakemen shall be utilized to determine the average wage in each such seniority district for the purpose of the Train Porter Subclass Members back pay formula. Any determination as to the manner in which this aspect of the back pay formula for Chair Car Attendant Subclass Members shall be deferred until the claim forms have been filed by such Class Members.

IT IS SO ORDERED.

/s/ Honorable Wesley E. Brown
7/22/81

APPROVED AS TO FORM:

/s/ Terry G. Paup and Lee H. Woodard, Attorneys for Plaintiff and Class Members

/s/ Chester I. Lewis, Attorney for Intervenor-Plaintiffs and The Brotherhood of Sleeping Car Porters

/s/ Thomas R. Conklin and Shelly J. Venick, Attorneys for Defendant, The Atchison, Topeka and Santa Fe Railway Company

/s/ William Sitzer and E. Lee Kinch Attorneys for Defendant, United Transportation Union

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

May 3, 1982

Mr. William Sitzer
Suite 3210
One Mercantile Center
St. Louis, MO 63101

Re: United Transportation Union, etc., v. Joe Vernon Sears, et al.
No. 81-221

Dear Mr. Sitzer:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice O'Connor took no part in the consideration or decision of this petition.

Very truly yours,

/s/ Alexander L. Stevas, Clerk

In The United States District Court
For The District Of Kansas

Case No. W-4963

Joe Vernon Sears, an individual, in person, and for all other persons similarly situated,
Plaintiffs

and

The Brotherhood of Sleeping Car Porters,
Intervenor-Plaintiffs

vs.

The Atchinson, Topeka and Santa Fe Railway Company and United Transportation Union, successor to Brotherhood of Railway Trainmen, a labor organization,
Defendants.

**ORDER**

Filed July 1, 1982

On this 10th day of June, 1982, the various motions and objections of the parties upon which the Court has not previously ruled comes on for hearing. The individual plaintiffs and the plaintiff class members appear by and through their attorneys of record, Terry G. Paup, Lee H. Woodard of WOODARD, BLAYLOCK, HERNANDEZ, PILGREEN & ROTH and Chester I. Lewis of LEWIS, DAVIS & MITCHELL. Defendant, THE ATCHINSON, TOPEKA and SANTA FE RAILWAY (Santa Fe) appears by its attorneys of record, Thomas R. Conklin and Shelley J. Venick. Defendant, UNITED TRANSPORTATION UNION (UTU) appears by its attorneys of record, William Sitzer and William B. Smith of DUBAIL, JUDGE, KILKER, O'LEARY and SMITH and E.L. Kinch of RATNER, MADDOX, BARNES & KINCH.

Thereupon, the Court after reviewing matters of record, including the authorities and memorandum briefs submitted by the parties, finds and rules as follows:

1. The motion to compel defendant UTU to answer interrogatories filed by the plaintiffs and class members (Docket 395) is granted and defendant UTU is ordered to supply the requested information to counsel for plaintiffs and the class members on or before July 10, 1982;

2. The motion to declare plaintiffs and class members the prevailing parties so as to reserve the determination of attorneys fees to be awarded their attorneys of record and to reserve prospective affirmative action injunctive relief for future determination (Docket 405) is granted;

3. Defendant's UTU's motion to vacate previous Orders and to dismiss the Complaints as to said defendant (Docket 411) is denied;

4. The motion filed by plaintiffs to strike the motion of defendant UTU, denied in paragraph No. 3 above, and for imposition of appropriate disciplinary action (Docket 420), is held in abeyance for future determination;

5. Defendant UTU's motion to refer this matter to a special master for the purpose of determining specific amounts to be awarded each class member (Docket 413) is denied;

6. The motion consolidate case no. W-4946, pending in this court, with this action, filed by the plaintiff in case number W-4946, Mildred Collins (Docket 48 in case no. 4946), is granted;

7. The motion of plaintiff-intervenor Ray E. Landrum for partial consideration (Docket 333) is denied; provided, however, that the claim of plaintiff-intervenor Ray E. Landrum shall remain for ajudicaiton after the claims of individual class members have been determined at which time the Court, in the

interest of justice, will consider said claim together with the propriety of certifying class of chaircar attendants;

8. Defendant UTU's motions to limit damage awards and to strike claims of individual class members (Docket 298, 316, 317, and 320) are denied;

9. The motions for substitution filed by the personal representatives of the estates for various deceased class members (Docket 312, 336, 340, 362, 367, 368, 372, 377, 381, 382, and 392) are granted;

10. Defendant UTU's motion to strike claims filed for class members who died prior to the filing of the Complaint (Docket 325) is denied and that part of said motion based upon a failure to substitute an appropriate party for deceased class members is denied as being moot because of the Court's ruling in paragraph I-9 above.

11. The adoptions of the claims filed by or on behalf of deceased class members, by the personal representative for each such class member (Docket 410, 416, 417, 421 and 423), are approved, and all such claims and amended claims may be pursued by the personal representatives just the same as if originally filed by them as of the date of the original filing;

12. The motion to strike the objections filed by defendant UTU to the claims of plaintiffs and/or individual class members (found in Docket 253, 262, 274, 275, 292, 306, 313, 321, 324, 346, 347, 357, 364, 365, 369, 374, 378, and 383) filed by the plaintiff (Docket 331) is reserved for future determination;

13. The motion for judgment on the pleadings or, in the alternative, for partial summary judgment, filed by plaintiffs (Docket 331), is denied; provided, however, that said motions may be reopened following the evidenciary hearings upon the claims of individual class members;

14. The motion for approval of the proposed formula for computation of individual awards filed by plaintiffs (Docket

408) is granted and defendant UTU's motion with respect to such formula (Docket 418) is denied; provided, however, the approved formula may be subject to future modification or revision based upon evidence, presented by defendant UTU, disputing or contesting the fairness of said formula or any component thereof; provided further, plaintiffs may also present additional evidence in the event defendant UTU so disputes the fairness of said formula;

15. The motion of defendant UTU to set aside this Court's prior order of judgment and for reconsideration of this Court's order refusing to quash garnishment and for payout of funds (Docket 404) is granted, and upon such reconsideration the Court's prior orders (Docket 402 and 403) are reaffirmed and restated, except that the order of judgment is modified to the extent that defendants SANTA FE and UTU shall each be liable for one-half of the plaintiffs' costs of appeal for which judgment in the amount of $4599.97 was previously entered and is now reaffirmed as revised;

16. The motion of plaintiffs and class members to strike the claims filed by Sidney N. Bell as a train porter and a member of the class (Docket 384) is granted;

17. Defendant UTU's motions to amend its objections to the claims of individual class members after additional discovery and for related or similar procedural relief (Docket 356, 358 and 359) are moot in view of the Court's other rulings and are, therefore, denied.

The disposition of the motions filed by the plaintiffs and class members for an order directing Santa Fe to grant carry over seniority to appropriate class members (Docket 322 and 331) shall be by a separate order of the Court.

The Court further finds that the above rulings shall also apply to all contentions, statements or requests contained in any briefs and memorandums filed by the parties and relating to the motions ruled upon.

II.

In addition to the foregoing, the Court finds that the parties in open court stipulated to:

A.

1. The authenticity of the personnel and employment records of defendant SANTA FE for each plaintiff and/or individual class member;

2. That said personnel and employment records should be deposited by defendant SANTA FE with the Clerk of the Court;

3. That said personnel and employment records shall be made available to all parties and that defendant SANTA FE shall be allowed to remove and return the same when such may be necessary in the regular course of its business;

4. And, by reason of the stipulation of authenticity the parties, without further foundation, may use said personnel and employment records and introduce the same into evidence at future hearings subject to the right of objection by any party on grounds other than authenticity.

The Court adopts and approves the above stipulation of the parties.

B.

The Court further finds that the parties have also stipulated as follows:

1. That the attached, revised and updated exhibit "A" to plaintiff's motion for approval of a formula for the computation of individual relief (Docket 408) authenticates and correctly sets forth the wages paid by defendant Santa Fe to each class member for the years shown therein; and,

2. that the attached, revised and updated exhibit "D" to said motion correctly shows each class member who received a settle-

ment payment from the settlement with defendant Santa Fe and further authenticates and correctly sets forth the amount of the settlement payment received by each such class member; and,

3. That by reason of this stipulation, the parties, without further foundation, may use the information contained in said exhibits, or any part thereof, and introduce the same into evidence at future hearings subject to the right of objection by any party on grounds other than authenticity or the correctness thereof.

III.

Based upon representations made by counsel during the hearing, the Court finds that by June 20, 1982, counsel for plaintiffs and class members shall provide counsel for defendant UTU with the amount of monetary relief claimed for each individual class member, excluding sums claimed because of adverse tax consequences (i.e. tax component) and sums attributable to Railroad Retirement benefits (i.e. RRA component) or any appreciation in the claimed amount or its components by reason thereof. Thereafter, and by July 4, 1982, counsel for defendant UTU shall provide counsel for plaintiffs and class members a list of each claim filed by an individual class member that will be disputed by the defendant UTU and, as to each such claim so listed, defendant UTU shall further set forth the following:

A. A specific statement of the factual and, if appropriate, legal or mixed factual and legal basis for each objection or defense that is raised by the defendant UTU; and,

B. The documentary evidence, or portions thereof, that will be used by defendant UTU in support of each such objection or defense;

C. The witnesses who will be called to testify in support of each such objection or defense; and,

D. any other evidence that will be presented in support of each such defense or objection.

Defendant UTU shall also submit by affidavit the substance of any expert testimony that will be used by said defendant in disputing the fairness of the formula for computing individual awards previously adopted by this Court, subject to additional objection and supporting evidence by the UTU, as provided in paragraph no. I-11. above. Such affidavits shall be executed by the expert involved and shall be furnished to counsel for plaintiffs and class members by July 4, 1982.

IV.

The Court finds that appropriate claims have been filed by seventy-three (73) class members or their personal representatives and that hearings on these individual claims shall commence on July 13, 1982. This Court shall hear no more than five claims per day.

All living individual class members whose claims are disputed shall personally testify before the Court unless they are unable to travel because of physical impairment or illness, or other good and sufficient reason, in which case they shall be deposed where they reside and their deposition testimony shall be presented to the Court. The same procedure shall be followed with respect to heirs or representatives of class members who are unable to travel. The testimony of other witnesses who do not reside in this District may also be presented by deposition.

Depositions of individual claimants or class members will be taken when necessary during weekends or on days that this Court is in recess and in such cases the depositions shall be transcribed and forwarded to the Court within five days. The parties are directed to arrange their schedules and notice of deposition by one party shall be binding upon all parties and the deposition shall be taken as scheduled therein.

IT IS SO ORDERED.

/s/ Wesley E. Brown
United States District Judge

Approved:

Terry G. Paup
and
WOODARD, BLAYLOCK, HERNANDEZ, PILGREEN & ROTH
and
LEWIS, DAVIS & MITCHELL

By: Lee H. Woodard
Attorneys for the plaintiffs
and the plaintiff class

DUBAIL, JUDGE, KILKER, O'LEARY & SMITH
and
RATNER, MATTOX, RATNER BARNES & KINCH

/s/ E. Lee Kinch
Attorneys for defendant UTU

Thomas R. Conklin
and
Shelley J. Venick

/s/ By: Thomas R. Conklin
Attorneys for defendant
Santa Fe

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CIVIL ACTION NO. W-4963

JOE VERNON SEARS,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, and THE UNITED TRANSPORTATION UNION,
Defendants.

**ORDER**

(Filed July 13, 1982)

NOW, this matter having come for hearing on June 10 to implement the decision of this court and the mandate of the Tenth Circuit, the parties to this litigation have agreed to an order to implement seniority relief to the plaintiff class.

In accordance with the Tenth Circuit opinion, a retroactive brakeman's or yardmen's seniority date of July 2, 1965, is to be awarded to each of the class members still actively employed and these persons shall be assigned a place in an appropriate seniority district.

The following persons have been determined eligible for a retroactive brakemen's seniority date of July 2, 1965, on a division of defendant Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") as follows:

| Name | Seniority Date | Division | Position |
|---|---|---|---|
| 1. B. C. Papin | 7-02-65 | Original Middle Division | January 1, 1982 Brakeman Roster No. 113½ |

| | | | |
|---|---|---|---|
| | | | January 1, 1982<br>Yardman Roster<br>No. 113½ |
| 2. Elgie Crow | 7-02-65 | Plains Division | January 1, 1982<br>Brakeman Roster<br>Zone One<br>No. 149½ |
| | | | January 1, 1982<br>Brakeman Roster<br>Zone Three<br>No. 229½ |
| | | | January 1, 1982<br>Yardman Roster<br>Zone One<br>No. 70½ |
| | | | January 1, 1982<br>Yardman Roster<br>Zone Three<br>No. 151½ |
| 3. W. W. Seymour | 7-02-65 | Colorado Division | January 1, 1982<br>Brakeman Roster<br>Denver District<br>No. 6½ |
| 4. A. Woolfolk | 7-02-65 | Colorado Division | January 1, 1982<br>Brakeman Roster<br>Denver District<br>No. 6¾ |
| 5. T. C. Luckey | 7-02-65 | Colorado Division | January 1, 1982<br>Brakeman Roster<br>First District<br>No. 31½ |

| | | | |
|---|---|---|---|
| | | | January 1, 1982<br>Yardman Roster<br>First District<br>No. 32½ |
| 6. L. C. Spencer | 7-02-65 | Eastern Division | January 1, 1982<br>Brakeman Roster<br>Original Eastern Division<br>No. 84½ |
| | | | January 1, 1982<br>Yardman Roster<br>Original Eastern Division<br>No. 37½ |
| 7. F. P. Tollett | 7-02-65 | Eastern Division | January 1, 1982<br>Brakeman Roster<br>Original Eastern Division<br>No. 84¾ |
| | | | January 1, 1982<br>Yardman Roster<br>Original Eastern Division<br>No. 37¾ |

The award of seniority as a brakeman for those persons not presently emloyed in that position, is subject to their satisfactorily meeting the physical standards for brakemen set by defendant Santa Fe that would be required of in-service employees of like age.

In respect to conductor's seniority, those person's presently holding conductor seniority are hereby given an adjustment in that seniority date to afford them the same relative standing they were afforded on the brakemen's roster. Accordingly, the

persons listed are entitled to an adjusted seniority date as a conductor as listed below:

| Name | Conductor's Date | Division |
|---|---|---|
| 1. B. C. Papin | 10-29-70 | January 1, 1982<br>Original Middle<br>Division<br>No. 79½ |
| 2. Elgie Crow | 4-13-70 | January 1, 1982<br>Plains Division<br>Zone One<br>No. 130½ |
| | | January 1, 1982<br>Plains Division<br>Zone Three<br>No. 191½ |
| 3. T. C. Luckey | 4-30-70 | January 1, 1982<br>Colorado Division<br>First District<br>No. 27½ |
| 4. W. W. Seymour | 5-01-69 | January 1, 1982<br>Colorado Division<br>Denver District<br>No. 6½ |
| 5. A. Woolfolk | 5-01-69 | January 1, 1982<br>Colorado Division<br>Denver District<br>No. 6¾ |

Those persons who are not presently employed as brakemen or conductors, upon satisfactorily completing six (6) months service or sooner if deemed qualified by Santa Fe, and upon satisfactorily passing the test for conductor, will be given a con-

ductor's seniority date to give them the same relative standing on the conductor's roster they were afforded on the brakeman's roster. These persons upon completing these prerequisites will be given the following dates:

| Name | Conductor's Date | Division |
|---|---|---|
| Mr. L. C. Spencer | 10-20-70 | January 1, 1982<br>Eastern Division<br>Former Southern Kansas<br>No. 86½ |
| Mr. L. C. Spencer | 10-20-70 | January 1, 1982<br>Eastern Division<br>Original Eastern Division<br>No. 62½ |
| Mr. F. Tollett | 10-20-70 | January 1, 1982<br>Eastern Division<br>Former Southern Kansas<br>No. 86¾ |
| | | January 1, 1982<br>Eastern Division<br>Original Eastern Division<br>No. 62¾ |

It is understood by this Court and the parties that the seniority standing of any individual, including plaintiff class is subject to fluctuations resulting from the ordinary course of business of defendant Santa Fe including employee reinstatements and collective bargaining changes. Therefore, the seniority standing of each plaintiff may be subject to change without modification of

this order to the extent that such changes are non-discriminatory and maintain the relative seniority standing of plaintiffs based upon their July 2, 1965, seniority date as brakemen or yardmen with other brakemen, yardmen, or conductors.

IT IS HEREBY ORDERED AND adjudged that defendants The Atchison, Topeka and Santa Fe Railway Company and the United Transportation Union provide the plaintiffs identified herein with retroactive seniority as brakemen, switchmen, and conductors as outlined herein.

/s/ Wesley E. Brown
U. S. District Court Judge

APPROVED: /s/ William Sitzer
Attorney for Defendant
United Transportation Union

APPROVED: /s/ Terry Paup
Attorney for Plaintiffs

APPROVED: /s/ Shelley J. Venick
Attorney for The Atchison,
Topeka and Santa Fe Ry. Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4963

Joe Vernon Sears, an individual, in person,
and for all other persons similarly situated,
Plaintiff,

and

The Brotherhood Of Sleeping Car Porters,
Intervenor-Plaintiffs,

vs.

The Atchison, Topeka & Santa Fe Railway Company
and United Transportation Union, successor to
Brotherhood of Railway Trainmen,
Defendants.

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Civil Action No. W-4946

Mildred Collins, Executrix of the Estate
Of James Collins, Jr.,
Plaintiff,

vs.

United Transportation Union,
Defendant.

**JOURNAL ENTRY**
(Filed Oct. 25, 1982)

NOW, on this 13th day of July, 1982, the above-captioned consolidated cases come on for trial to the Court. The plaintiffs, intervenors and all class members appear by and through their attorneys of record, Terry G. Paup, of Wichita, Kansas; Lee H. Woodard, of Woodard, Blaylock, Hernandez, Pilgreen & Roth, of Wichita, Kansas; Chester I. Lewis, of Lewis and

Davis, of Wichita, Kansas; and Jim L. Lawing, of Wichita, Kansas. Defendant, United Transportation Union (UTU), appears by and through its attorneys of record, William B. Smith and William Sitzer, of Dubail, Judge, Kilker, O'Leary & Smith, of St. Louis, Missouri, and E. Lee Kinch, of Ratner, Mattox, Ratner, Barnes & Kinch, of Wichita, Kansas. Defendant Atchison, Topeka & Santa Fe Railway Company (Santa Fe) appears by and through its attorney of record, Thomas R. Conklin of Topeka, Kansas.

THEREUPON, the Court first stated that the two primary purposes for the hearing were:

> (1) To finally resolve any remaining disputes involving the formula to be used in computing the individual monetary awards to plaintiffs and class members which was tentatively approved on June 10, 1982; and,
>
> (2) To determine the validity or invalidity of each disputed claim filed by a class member or his personal representative.

THEREUPON, the Court, having reviewed matters of record, and after hearing stipulations and statements of counsel, found that in accordance with the Court's order of June 10, 1982, the UTU only disputed claims filed by or on behalf of five (5) individual class members. Thereafter, the Court further found that the UTU agreed to take the following action with respect to three (3) of the disputed claims:

> (1) To withdraw its objection to the claim filed on behalf of John W. Landrum upon the statement in open Court of counsel for plaintiffs and class members that said claim should be amended to limit the period for back pay relief from July 2, 1965, until November 21, 1970;
>
> (2) To withdraw its objection to the claim filed by Herbert Leroy Jenkins after an amendment to that claim was filed correcting a clerical error therein;

(3) To withdraw its objection to the claim of Ashley M. Bennett.

THEREFORE, after reviewing matters of record and upon hearing the statements and stipulations of counsel, the Court found that the UTU did not dispute any claim of any class member other than the claims of Leon Albert Finley and Winfred William Seymour and that the information contained in each of the undisputed claims or amended claims filed by or on behalf of all class members was true and correct. Accordingly, the Court further found that the undisputed claims were valid and established a right to recover relief against the UTU.

THEREUPON, the Court heard the testimony of Winfred William Seymour in support of his individual claim and ordered that his counsel would have ten (10) days in which to file a supporting brief, with the UTU to file an answering brief within five (5) days thereafter.

THEREUPON, the application to make a partial award of attorneys' fees to plaintiffs and the class members was withdrawn without prejudice and counsel for the UTU agreed to advance the sum of fifteen thousand dollars ($15,000.00) to be applied to the payment of fees and related costs owing expert witnesses for the plaintiffs and class members without prejudice to any party.

THEREUPON, counsel for the plaintiffs and class members and counsel for the UTU announced to the Court that an agreement had been entered into by the parties concerning the interest component of the formula to be used to calculate back pay relief. Under that agreement the parties stipulated that for all purposes herein (i.e., prejudgment and postjudgment) the interest rate to be applied to all class member back pay awards should be calculated by using both the equivalent annual yield factor and accumulation factor as was done and set forth in Exhibit "A" attached hereto, and the calculation of such interest rate shall include any computation errors in Exhibit "A"; that

any future determination of the equivalent annual yield factor or accumulation factor shall be made by using the interest rate on ninety-one (91) day U.S. Treasury Bills in a manner identical to that employed by Professor Ralph W. Estes, the individual who prepared Exhibit "A"; and that under the agreement of the parties the UTU did not prejudice its right to claim that no interest whatsoever should be awarded to plaintiffs and class members.

THEREUPON, the Court noted that those class members who were present and in attendance had approved the agreement concerning the interest component of the formula under which back pay relief was to be calculated and the Court directed counsel for the plaintiffs and class members to notify all other class members of this agreement. The Court further found that the same should be used for all prejudgment and postjudgment interest computations upon all class member back pay awards subject only to future reconsideration in the event that an absent class member poses a valid, timely objection with the Court.

THEREUPON, Counsel for the UTU withdrew the UTU's contention that "tips" or gratuities received by class members should be included in the formula under which back pay awards are to be calculated and determined.

THEREUPON, the Court reviewed UTU's Motion for Designation of Party Plaintiff as Representative of Chaircar Attendants' Subclass for Purposes of Computing Back Pay Awards to This Subclass Under Title VII (Docket 434) and found that the same should be overruled.

THEREUPON, counsel for the parties announced that all issues relating to the individual claims of the plaintiffs and class members, or the formula under which individual relief was to be determined, had been decided or resolved by the Court, except for the following:

A. Whether class members should be compensated for lost or decreased pension or retirement benefits under the RRA COMPONENT and, if so, the amount thereof;

B. Whether class members should be compensated for the adverse income tax impact of their receiving their individual back pay awards in a single year under the proposed TAX COMPONENT and, if so,

1. whether or not the law of this case prevents the award of a TAX COMPONENT to all class members; and/or,

2. whether or not the proposed TAX COMPONENT computed in the manner set forth in the affidavit of Robert H. Tanner (Docket 429), expert for plaintiffs and class members, is based upon incorrect assumptions or speculations which require it to be disallowed;

C. The amount of attorney's fees and costs to be awarded to the plaintiffs and class members herein.

IN REGARD to the remaining unresolved issues, the Court found that the parties should list all witnesses and exhibits concerning each of the disputed issues with the Clerk and opposing counsel on or before August 10, 1982. In addition, counsel for the plaintiffs and class members were directed to file a final tabulation of the proposed back pay award for each class member that included the RRA COMPONENT and the TAX COMPONENT and that the same should be filed with the Clerk and opposing counsel on or before August 10, 1982. The Court also ordered that if any party desired to submit briefs or memoranda on the above remaining disputed issues, the same should be filed with the Clerk and opposing parties on or before September 10, 1982. The Court finally found that this matter would be rescheduled for September 21, 1982, at 9:30 a.m., in room 408, U. S. Courthouse, Wichita, Kansas.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

A. The Claim of Winfred William Seymour is taken under advisement by the Court and that the claim of Leon Albert Finley is deferred until the testimony of said class member can be taken and submitted to the Court;

B. All other claims or amended claims for back pay relief filed by or on behalf of all other class members are valid and establish the right to recover awards of individual back pay relief against defendant UTU for the period stated in each such claim;

C. The interest rate to be applied to all individual awards of back pay relief shall be determined in the manner set forth in the Court's findings.

D. All stipulations and agreements of the parties announced in open Court upon the record are accepted and approved by the Court;

E. The Motion for Designation of Party Plaintiff as Representative of Chaircar Attendants' Subclass for Purposes of Computing Back Pay Awards to This Subclass Under Title VII, which was filed by the UTU, is denied;

F. The remaining issues involving the RRA and TAX COMPONENTS of the formula under which back pay relief will be calculated, together with the issue of attorneys' fees and costs to be awarded in this case will be heard on September 21, 1982, at 9:30 a.m. A listing of witnesses and exhibits, along with supporting briefs and memoranda, shall be filed by all parties with the Clerk and opposing counsel as previously provided in the findings of this Court.

IT IS SO ORDERED.

/s/ Wesley E. Brown
United States District Judge

Approved:

Terry G. Paup
and
WOODARD, BLAYLOCK, HERNANDEZ, PILGREEN & ROTH
and
LEWIS & MITCHELL

By: /s/ Lee H. Woodard
Attorneys for the Plaintiffs
and the Plaintiff Class

DUBAIL, JUDGE, KILKER, O'LEARY & SMITH
and
RATNER, MATTOX, RATNER, BARNES & KINCH

By: /s/ William Sitzer
Attorneys for Defendant UTU

Thomas R. Conklin

/s/ Thomas R. Conklin
Attorney for Defendant Santa Fe

Sears v. Santa Fe Ry

U.S. District Court,
District of Kansas

Sears and The Brotherhood
of Sleeping Car Porters, et al.,
Intervenor-Plaintiffs

v.

The Atchison, Topeka & Santa Fe
Railway Company and United Transportation
Union, successor to Brotherhood of
Railway Trainmen; Collins, Executrix
of the Estate of James Collins, Jr.

v.

United Transportation Union,

Nos. W-4963 and W-4946

December 1, 1982

BROWN, Senior District Judge: — On November 23 and 24, 1982, this Court held further hearings in these cases to implement the decision of the Tenth Circuit, found at 645 F.2d 1365, 25 FEP Cases 337. The purpose of these hearings was to finally determine the formula to be used in computing the back pay award to plaintiff class, and to determine the amount of attorneys' fees to be awareded. Having heard the various motions, arguments of counsel, and evidence presented, and having thoroughly reviewed the file herein and being fully advised in the premises, the Court now enters the following Memorandum and Order.

The file reflects six specific matters which are before the Court for decision at this time in connection with rendering final relief in these cases. These are:

1. Defendant UTU's motion for reconsideration of its motions to strike the claims of certain class members.

2. The claim of plaintiff-intervenor Ray E. Landrum, and the motion of other chair car attendants for intervention herein.

3. Plaintiffs' motion to compel answers to interrogatories.

4. Whether the class members' recovery should include the RRA Component for lost retirement benefits.

5. Whether class members' recovery should include their proposed tax component to offset the adverse income tax impact of receipt of the back pay awards in a single year.

6. The amount of attorneys' fees and costs to be awarded plaintiff class.

Each of these matters will be taken up in turn, but two preliminary matters will be discussed in this introductory summary. First, the Court finds that there are no remaining disputed claims on behelf of any class members (train porters). Only two remained as of the Court's Order of July 13, 1982, Dkt. 479; Leon Albert Finley, and Winfred William Seymour. By Dkt. 467, Mr. Seymour moved for Court approval of a settlement agreed upon between himself and UTU, and for dismissal of his individual claim. The Court hereby grants said motion, approves said settlement, and dismisses the individual claim of class member W.W. Seymour against the defendant UTU. It is noted that plaintiffs' final submission of back pay computations, Dkt. 457, includes no amount for W.W. Seymour. The Court by Order of November 3, 1982, Dkt. 481, held the amended claim of L.A. Finley undisputed, and UTU's objection to the previous claim, Dkt. 433 moot, pursuant to agreement of the parties.

In accordance with the report of plaintiffs' counsel at Dkt. 473, the Court finds that all class members or their representatives have approved the stipulation entered into by counsel for the class and counsel for defendant UTU regarding interest on back pay to be awarded, as set forth in Exhibit A to Dkt. 435.

*Matters Remaining for Disposition*

**1. Defendant UTU's Motion for Reconsideration of Motions to Strike Claims of Certain Class Members — Dkts. 298, 316, 482, 485, and 496.**

UTU asks the Court to reconsider striking the claims of all class members who died, retired, or became disability annuitants before May 1, 1972. In the Court's Order dated June 10, 1982, Dkt. 432, UTU's motion to limit the damage award in this manner was denied. No new arguments are made in support of the request, and the Court fully explained its reasons for denial of the motion in the June 10, 1982 hearing. Nevertheless, we again summarize briefly the bases for the denial, which continue to convince us that the earlier ruling was and remains correct.

UTU argues that there is no basis in law or in fact for holding it liable to any class member to whom Santa Fe was not also liable. This is demonstrably untrue. The Opinion of the Tenth Circuit, Dkt. 220, 645 F.2d 1365, at 1377, footnote 12, 25 FEP Cases 337, at 345, states that the UTU is liable to the class, and that all class members are entitled to an award accruing from July 2, 1965. This Court's Order Dkt. 78, dated September 8, 1975, approved a compromise settlement between the plaintiff class members and defendant Santa Fe in which *Santa Fe's* liability to the class did not extend to class members who retired, became disability annuitants, or died prior to May 1, 1972. The last paragraph of that Order stated that it did not affect the liability issue of the UTU for back pay relief and attorney's fees under Title VII. UTU continues to try to take advantage of the compromise settlement between plaintiff class and the Santa Fe, to which the UTU was not a party. We find no justification for allowing it to do so. The motion for reconsideration is granted, and the Court adheres to its previous ruling. UTU's full liability to the class is completely unaffected by Santa Fe's liability to and settlement with the class. Therefore, UTU's alternative motion to declare Santa Fe jointly and severally liable to class

members who died, retired or became disability annuitants before May 1, 1972 is also properly denied.

**2. Motion to Intervene or in the alternative, to Consolidate and to Redefine the Class Herein, and to Designate an Additional Sub-Class of Black Chair Car Attendants; Claim of Plaintiff-Intervenior Ray E. Landrum — Dkts. 333, 334, 487, 492, and 495.**

The Court commented in the July 13, 1982 hearings that the claim of plaintiff-intervenor Ray E. Landrum, a black chair car attendant, would remain for adjudication after the claims of the present class, as well as the question of the propriety of certifying a class or subclass herein of chair car attendants. (The new class would include those employees of Santa Fe who *only* worked as chair car attendants, not the chair car attendant subclass already certified who had been train porters and were then demoted to chair car attendants).

As a preliminary matter, Mr. Paup has moved in Dkt. 491 for permission to withdraw from the representation of Mr. Landrum and any chair car attendant class. The basis for the motion is Mr. Paup's belief that conflicts may develop between the chair car attendants and the train porters. Mr. Landrum has engaged Mr. C. Robert Bell to represent him. The Court has granted Mr. Paup's motion to withdraw by Order, Dkt. 491.

In its Order of August 4, 1975, Dkt. 61, this Court certified under Rule 23(b)(2) a class composed of all black train porters employed by Santa Fe from July 2, 1965 to the date of the Order. It was further stated that the Order did not prejudice the rights of the parties to renew or otherwise assert the creation of new classes or subclasses, or the reformulation of class definitions. The motion now before us is filed by black chair car attendants working for the Santa Fe at some time from July 2, 1965 to the present, seeking to intervene in this action. Alternatively, they request consolidation of their actions under Title VII with the present class action, and designation of them and

all persons similarly situated as a new class. Movants state that their causes of action against the defendants contain common questions of law and fact with those of the train porters, namely that they were victims of the same discriminatory seniority system for which defendants have already been found liable herein. Movants also state that their intervention will not delay nor prejudice the adjudication of the rights of any of the parties herein, but movants' rights and causes of action may be prejudiced if intervention is denied. They recognize, however, that additional questions of fact pertaining especially to the relief requested would require determination, including preparation of questionnaires and other discovery mechanisms similar to those used with the train porter class. Finally, movants assert that with intervention, final disposition of their claims can be accomplished within months rather than years.

Plaintiff train porters, by Dkt. 495, state that they have no objection to the proposed intervention so long as the Court certifies the judgment to be entered in their favor as final under Rule 54(b). This would eliminate the train porters' main concern that there be no further delay of the final resolution of all issues existing between them and the UTU.

Defendant Santa Fe, however, voiced strong objection to the granting of intervention. Santa Fe argues that these movants, chair car attendants who were never train porters, have never been members of any class or subclass herein. Also, it argues that the movants' claims could not be resolved in months, as they allege in support of intervention, because there are many agreements and issues not involved in W-4963 which would be centrally important in movants' suits. Moreover, movants' claims would involve several indispensable parties which are not parties to the present action. Finally, Santa Fe asserts that intervention will unavoidably delay final judgment as to the train porters, and will prejudice the rights of the defendants. Defendant UTU points out that the motion to intervene was not filed until one week prior to the hearing, and that neither the parties nor the Court have had an opportunity to fully research the matter.

The Court recognizes its duty to protect the rights of all the parties herein, as well as the rights of movant chair car attendants. We are also keenly aware of our duty to render final judgment as to the train porter class now before us without further delay. In view of both these duties, the Court will enter final judgment as to the train porter class herein, pursuant to Rule 54(b). As we have heretofore noted, the claim of Ray E. Landrum, plaintiff-intervenor in this case who was a chair car attendant and not within the train porter class, will remain for adjudication after the train porter judgment. This fact will, we believe, protect the rights of movants, since motions for consolidation with Ray E. Landrum's outstanding claim and for certification of a chair car attendant class could be made in this case at an appropriate later time. Thus, the Court will hold in abeyance its ruling on movants' motion to intervene until the Court receives further briefs on the matter. Movants will have 30 days from the date of this Order in which to submit their brief, and all parties presently involved in these actions will have 30 days thereafter in which to respond.

**3. Plaintiffs' Motion to Compel Answers to Interrogatories — Dkts. 489 and 490.**

On August 12, 1982, plaintiffs submitted interrogatories to UTU concerning the identity and location of its assets. UTU objected to the interrogatories and refused to answer them, stating that the purpose for which information was sought could only be in aid of execution on the judgment to be rendered herein. UTU argues that information concerning how a potential judgment will be satisfied is irrelevant to any claim or defense in this action, and therefore outside the scope of discovery under Rule 26, F.R.Civ.P. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, at 352, 57 L.Ed.2d 253, at 265-266, 98 S.Ct. 2380 (1978) does seem to support this position by dictum.

Plaintiffs submit that the identity and location of the assets of UTU are certainly relevant to the issue of collection of the judg-

ment to be rendered herein. We can agree with this statement, but plaintiffs must remember that no judgment has been rendered yet. Thus, as UTU points out, even if such information will be relevant and thus discoverable after judgment, plaintiffs' motion is premature. We agree with UTU. Surely UTU should be given the benefit of an assumption that it will pay the judgment to be rendered, and that execution thereon will be unnecessary. If after the judgment is entered, plaintiffs must seek the Court's help in obtaining satisfaction thereon, such a motion may be made at that time. At this point, plaintiffs' motion to compel answers is denied.

**4. Whether the Class Members' Recovery Should Include the RRA Component for Lost Retirement Benefits — Dkts. 457, 484, and 493.**

The Tenth Circuit stated in its opinion, Dkt. 220, 645 F.2d 1365, at 1378, 25 FEP Cases 337, at 346:

> The remedy fashioned by the court should represent a reasonable attempt to restore the victims of discrimination to a position where they would have been absent the unlawful impact of the seniority system. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280, 10 FEP Cases 1181, 1188 (1975).

The Circuit also noted that the trial court has wide discretion in fashioning remedies to make victims of discrimination whole. Thus, while lost retirement benefits and adverse tax consequences were not specifically discussed by the Court of Appeals, it having no occasion at that point to do so, these relief components, we believe, are well within the broad "make whole" language of the Circuit opinion.

Nevertheless, the UTU argues that the pleadings did not seek a tax component nor retirement benefits. Plaintiffs did seek retirement benefits specifically in their 1978 "remedial" submissions, Dkts. 147 and 195. In any case, plaintiffs are right when

they point out that Rule 54(c), F.R.Civ.P., requires the Court to grant the relief to which they are entitled, whether or not plaintiffs demanded it in their pleadings. The UTU has not shown that the failure to specifically request a tax component prejudiced it in any manner, so as to make full relief under Rule 54(c) improper.

As a general matter of principle, we see both components as elements of the back pay to which plaintiffs are entitled, much the same as interest is properly made part of the award. All these components are necessary to make plaintiffs whole, and to do justice to these discriminatees. The complaints under Title VII themselves invoked no less than "whole" relief. The back pay award would be incomplete without lost retirement benefits, and would be diminished without adjustment for adverse tax consequences. There was no necessity for a specific prayer that back pay be complete and undiminished. The UTU's specific objections to allowance of the retirement and tax components are taken up in the following discussion.

UTU's first specific objection to the retirement benefits component is that spousal and survivors' benefits should not be included. UTU argues that this follows from the fact that such benefits belong not to the class member employees themselves, but to their spouses and survivors. Plaintiff class argues that the spousal and survivors' benefits sought represent only the difference between the actual benefits which have been or are being paid by the Railroad Retirement Board, and the amount such benefits would have been had each class member earned what he would have absent discrimination. The sums being sought are wholly derivative from the class members' status and wages, and teh spousal and survivors' benefits have been decreased by the discriminatory impact of the seniority system. Class members urge that none of these benefits are available to a spouse or survivor unless the class member has earned said amounts for them.

The Court can only see these benefits as a part of the class-member/employee's compensation package — a "fringe benefit" or alternative method of wage payment. It was the class members' labor which earned this right for their families, and the component represents a lost portion of the wages which would otherwise have been paid to the employee himself. In that sense it is something the employee lost. The spouse or survivor had no present right to receive it at the time of the discriminatory impact, any more than a putative heir has a present right to wages which increase the wage earner's estate. We conclude that spousal and survivors' retirement benefits are properly included in the back pay award.

The second specific objection of the UTU is that the lump sum award of future retirement benefits should be reduced to present value to account for interest to be earned thereon, just as the Estes interest factor was used to increase past amounts due the class. Class members allow that defendant's objection to the failure to discount future retirement benefits has some merit. Plaintiffs argue for the "offset" approach, in which the discount rate for reduction to present value is deemed to be offset by the rate of inflation reducing the purchasing power of money. However, plaintiffs note that Steckler v. United States, 549 F.2d 1372 (10 Cir. 1977) approved independant determination of the discount and inflation rates. Under Steckler, the likely decrease in purchasing power due to inflation would be determined first, which would presumably increase the overall award. Then, this ultimate sum should be reduced to present value by the discount rate, or the probable amount of interest obtainable.

Guided by Steckler, supra, the Court invited both plaintiffs and the UTU to produce expert testimony on both the discount and the inflation rates. UTU did not present evidence, but the Court did hear plaintiffs' economics expert, Dr. Terrell. He testified that the average 91-day Treasury bill rate over the 64 yearly quarters from the first quarter of 1966 to the first quarter

of 1982, which he used as the discount rate, equalled 1.7356% per quarter. This figure was chosen by Dr. Terrell because new banking regulations will allow banks to pay exactly the 91-day Treasury bill rate of interest to depositors. As the rate to be used in reducing the award of future retirement benefits to present value, Dr. Terrell used the average quarterly increase in the Consumer Price Index over the same 64 quarters used in the discount rate calculation. This figure is 1.70291% per quarter. Thus, this application of the discount and inflation rates results in a raw net discount rate, indicating the future retirement benefits portion of the RRA Component should be reduced by .03269% per quarter, a very negligible amount. Dr. Terrell also stated, however, that the assumption that class members would be able to obtain the full 91-day Treasury bill rate, did not take into accousnt the .3% to .5% operating fee which banks would probably charge depositors. If a .4% fee were charged, the CPI average rate would be slightly greater than the discount rate, resulting in a net inflation rate by which this portion of the award should be increased. However, the amount of the increase would again be negligible. The Court concludes from this testimony that the future retirement benefits portion of the RRA Component should be neither increased nor decreased.

As its final objection regarding the RRA Component, UTU is concerned that it will be required to pay some percentage of the award to the Railroad Retirement Board, as would be withheld from wages. Thus, UTU asserts that it may have to pay twice, once to class members and once to the Board for class members, both amounts representing lost retirement benefits. Plaintiffs assure the Court that the RRA Component was designed to affect neither the Board's level of payments to employees, nor contributions from anyone to the Board. At the hearing, UTU admitted that Santa Fe was the employer, that only employers are required to make contributions to the Board on behalf of employees, and that the UTU has never made any such contributions. Nevertheless, approximately 5% of the amount of the back pay Judgment to be entered will be withheld by the

Clerk of the Court. This amount will be available to be applied against any contribution the UTU is hereafter required to make to the Board on behalf of the class members because of the Judgment herein.

**5. Whether Class Members' Recovery should Include Their proposed Tax Component (to offset the adverse income tax impact of receipt of the back pay awards in a single year) — Dkts. 449, 450, 457, 471, 484, and 493.**

UTU first argues that the equitable remedy of Title VII, requiring "make whole" relief, while including back pay and fringes, does not include a tax component since taxes are not paid by the employer to the employee. Further, UTU asserts tt adverse tax consequences may not be considered by the Court in making an award to plaintiffs since these are collateral losses. UTU cites NLRB v. Gullett Gin Co., 340 U.S. 361, 95 L.Ed. 337, 71 S.Ct. 337, 27 LRRM 2230 (1951), among others. UTU also contends that the tax component should be stricken as an attempt to secure "compensatory" damages for plaintiffs.

First, it is appropriate to note that the Court finds none of UTU's citations directly in point, or even particularly instructive. Gullett approved the NLRB's refusal to deduct collateral unemployment compensation *benefits,* as within its discretion. Nowhere are income taxes mentioned, and even assuming they are collateral *losses,* the Supreme Court's comment that collateral losses should not be considered is dictum. We can readily agree with UTU that the purpose of Title VII is not to compensate for non-economic injuries, but that does not settle whether a tax component is properly awardable here. Title VII does contemplate "compensation" for lost earnings, and we believe this must include all economic effects of the wrongful discrimination. The Court's duty is to exercise its discretion by placing class members, as nearly as possible, in the position they would have occupied absent discrimination. We fail to see how this will be accomplished without a tax component, taxes on the

facts before us having a direct adverse economic effect, which is traceable to the unlawful seniority system.

In fairness, plaintiffs have not been able to find direct authority *allowing* a tax award under Title VII, though they cite many other cases under other statutes allowing consideration of tax consequences of an award. It is the Court's opinion that the lack of authority as to tax awards under Title VII may stem from the fact that few cases have involved discriminatory systems perpetuated for so long a period which to this very day goes unremedied. Of course, the nearly century-long pattern of discriminatory impact did not become actionable under Title VII until July 2, 1965, but the more than 17-year interval between that date and this would render any award not including interest and tax adjustment inequitable and unjust.

In view of this dearth of controlling authority, this Court must be guided by the general principles underlying the Title VII remedy. The following comments from Albemarle Paper Co. v. Moody, 422 U.S. 405, at 418, 45 L.Ed.2d 280, at 297, 95 S.Ct. 2362, 10 FEP Cases 1181, at 1187-1188 (1975), are instructive:

> ... [T]he historic purpose of equity [is] to "secure complete justice." ... "[C]ourts will be alert to adjust their remedies so as to grant the necessary relief." ... Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past...." (Citations omitted.)

Quoting from the Analysis introduced by Senator Williams to accompany the Conference Committee Report on the Equal Employment Opportunity Act of 1972, the Supreme Court stated, 422 U.S. at 420, 45 L.Ed.2d at 298, 10 FEP Cases at 1188:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to

> fashion the most complete relief possible. ... [T]o make the victims of unlawful discrimination whole, ... persons aggrieved by the consequences and effects of the unlawful employment practice [should] be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong.Rec. 7168 (1972).

It is the Court's considered opinion that equity requires making a tax component a part of the back pay formula. As the UTU recognizes, this is an equitable remedy. Had it not been for the discriminatory seniority system, plaintiffs would not have suffered adverse tax consequences from receiving all the back pay due them in a single year. It would be fundamentally unfair to force the class members to pay more income taxes now, having suffered the discrimination, than they would have if they had received the wages as they became due. Thus, to make plaintiffs whole, defendant UTU, whose actions brought about the loss of back pay and resulting adverse tax consequences, must bear the financial responsiblity for restoring plaintiffs to the positions they would have been in without the discriminatory seniority system. UTU offers no valid justification for reducing the award by striking the tax component and thus making the class less than whole. This would amount to giving the UTU credit against its full liability for the delay its own discriminatory acts engendered.

UTU also disputes whether any payments made by it as a labor organization are taxable income to any class member. Glancing through the notes to 26 U.S.C.A. § *104, it appears that awards of back pay under Title VII are compensation for services and therefore normally an item of gross income. Hodge v. C.I.R., 64 T.C. 616 (1975). UTU's argument that any award made herein would be excludable from gross income as damages for personal injuries is unconvincing. UTU also urges that the tax component should not include taxes on retirement benefits, since they are not taxable. Actual retirement benefits paid by*

*the Board are apparently excluded from income taxation. But consistently with what has been said heretofore, this portion of the award does not represent actual retirement benefits. Rather, it is substituted compensation for the lost-retirement-benefits portion of earned wages. It represents direct compensation to the employee for his services in place of retirement benefits which will never be paid. We believe the entire award herein will be includable in the gross income of each class member. In accordance with that belief, approximately 20% of the amount of the backpay Judgment to be entered will be withheld by the Clerk for satisfaction of taxes owed by class members.*

The Court had earlier expressed some concern regarding whether a tax component was precluded either by virtue of the law of the case, or by being based on incorrect assumptions and speculations. We are now satisfied that neither concern is well founded. Prior to this point, the question of taxes had not been specifically considered by this Court, and there was no occasion to determine that question before the ultimate decision on relied which is now ripe. Consequently, as we noted hereinbefore, the issue was not before the Court of Appeals, and was not ruled on by that Court. The discretion we must exercise has not been restricted by previous rulings. Finally, we have decided that the award will be taxable, so that previous assumption was not incorrect. Plaintiffs' computations using actual income for each year including 1982, based on use of actual subclass average wages and minimal simplifying assumptions, convinces the Court that the tax component is not too speculative. The amount of the tax component portion of the award is reasonably certain.

The Court has reviewed in some detail Dr. Terrell's affidavit and testimony, as well as plaintiffs' proposed tax component computations. We are convinced that the tax component suggested is a fair adjustment for adverse tax consequences, and it will therefore be added to the back pay award herein. Based upon our review of plaintiffs' final submission of back pay

awards, the computations therein, and consideration of all the evidence before it, the Court finds that final Judgment should be entered against defendant UTU and in favor of the plaintiffs, intervenors, and class members for back wages in the total amount of $5,995,365.65. Judgment will be so entered by separate Order this day, with directions to the Clerk concerning the payment and disposition of said award.

**6. The Amount of Attorneys' Fees and Costs to be Awarded Plaintiff Class — Dkts. 456, 458, 459, 460, 462, 463, 468, 470, 472, 477, 483, 488, 497, 498, 500, 501, and 503.**

The first issue we take up with regard to attorneys' fees is UTU's contention found in Dkt. 483, that no fees or costs which were incurred in connection with the administration of the estates of any deceased class members should be allowed. UTU's motion to strike these amounts is based on the proposition that state probate proceedings do not arise under Title VII and are therefore outside that statute's attorneys' fees provision. Plaintiffs resond, Dkt. 488, by reminding the Court that UTU filed suggestions of death and motions to strike the claims of all 25 deceased class members, on the ground of failure to substitute the personal representatives of decedents' estates as parties plaintiff.

We believe plaintiffs are right in assertin that the opening and administration of deceased class members' estates was necessary to preserve their claims herein. In incurring estate administration expenses in relation to the deceased class members, counsel provided "services which contribute[d] to the ultimate termination of the Title VII action." Chrapliwy v. Uniroyal, Inc. 670 F.2d 760, at 767, 28 FEP Cases 19, at 25 (7 Cir. 1982), appeal to the Supreme Court pending, (no citation). As the expenses were incurred as a necessary step in the eventual Title VII recovery, the Court holds that Title VII includes such expenses in the award of attorneys' fees. UTU's motion to strike the estate administration expenses from the attorneys' fees and costs award is denied.

Before turning to the determination of the actual amount of attorneys' fees, the Court calls attention to the recent opinion of the Tenth Circuit in Cooper v. Singer, Nos. 81-2016 and 81-2113 (Sept. 30, 1982). In that case, which concerned attorneys' fees under 42 U.S.C. § 1988, the majority held that the attorneys' fees award must be the lesser of the agreed-upon fees or reasonable fees. In other words, the agreement for fees set the maximum amount allowable, and if that is above what is reasonable, only the reasonable portion may be awarded. We believe Cooper applies here, though the action is brought under Title VII.

At the hearing on these matters, Terry Paup and Jim Lawing, attorneys for certain plaintiffs and class members herein, stated that they had agreed with those persons for a fee equal to one-third of the total of the back pay award plus the attorneys' fees awarded by the Court. This amount was contingent upon the ultimate success of plaintiff class herein, and was to be increased to 40% if the Judgments herein were appealed. The arrangements made between these attorneys and their clients cannot be binding on UTU, which under the law is required to pay plaintiffs' attorneys' fees. They are, however, an indication of the value placed by these class representatives' on the service of their attorneys, if those fees were required to be paid from plaintiffs' recovery. Chester Lewis and Lee Woodard, who have represented other plaintiffs and class members in these suits, stated they had agreed with their clients that if the class recovered, they would receive the amount which the Court saw fit to award in attorneys' fees. If the class recovered nothing herein, the clients would not be liable for payment of any fee to their attorneys. The Court finds that the reasonable fees as determined hereafter are less than the fees agreed to by the clients of Messrs. Paup and Lawing. Thus, under Cooper, only those reasonable fees are to be awarded for the services of all attorneys representing plaintiffs and class members herein.

The final and difficult problem which faces the Court is the question of what constitutes a reasonable fee for plaintiff class'

attorneys. Two of the highly controversial issues which this Court must resolve are, first, the number of hours which were reasonably required or expended for proper representation of the class, and second, the reasonable rate by which those hours are to be multiplied. We have reviewed the application for fees and its supporting affidavits, various briefs, and the law. We have also heard the testimony of the attorneys called by plaintiffs and defendant UTU on this issue.

In coming to the holding on this issue, the Court has been cognizant of the fact that some attorneys for the class have represented its members from 1972 to the present. Since the filing of the cases in that year, all able counsel for all the parties have spent much time and effort to present the facts and law of this complicated controversy in a manner which would permit the Court to resolve the dispute in a justiciable manner. The cases have been before this Court twice, and before the Court of Appeals for the Tenth Circuit. Plaintiff class has succeeded in opposing review of the cases by the United States Supreme Court.

The hours submitted by each attorney for plaintiff class, as stated in Dkt. 459, and supplemented in Dkts. 497, 498, 500, and 501 are:

| | |
|---|---|
| Terry G. Paup | 4,401.42 |
| Lee H. Woodard | 1,680.50 |
| Chester I. Lewis | 1,671.15 |
| Jim Lawing | 104.30 |
| TOTAL HOURS | 7,857.37 |

Although the Court has received Mr. Lawing's supplemental affidavit and application for 20 additional hours, Dkt. 503, we do not include those hours in the figures above. The Court had already done substantial work on this Order prior to this date, and Mr. Lawing did not submit Dkt. 503, claiming hours in the final hearings last week, until the morning of November 29, 1982. The other three attorneys for the class also spent time

with the Court last week to reach this final disposition, but did not submit a claim for those services. In any event, our determination of the reasonable hourly rate to be allowed, and increase of the"lodestar" by a multiplier, fully and reasonably compensates plaintiffs' attorneys for all their services, including those most recently rendered.

The UTU contends that 5,000 hours would constitute a reasonable amount of time spent on the case, although at the hearing on this matter it did not contest the actual hours as submitted by the attorneys for the class. We believe the hours stated represent a reasonable and therefore compensable expenditure of time on this lengthy case. However, the total figure above implies a greater exactitude than we believe can be reached, and we therefore round off the hours spent to 7,800.00.

Although the Tenth Circuit has not followed any fixed standard in setting attorneys fees in Title VII cases, the considerations set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 7 FEP Cases 1 (5 Cir. 1974) have been generally approved. Salone v. United States, 645 F.2d 875, 25 FEP Cases 680 (10 Cir. 1981) cert. denied 454 U.S. 894, 70 L.Ed.2d 2081, 102 S.Ct. 390, 26 FEP Cases 1688; EEOC v. Safeway Stores, Inc., 597 F.2d 251 (10 Cir. 1980). Plaintiffs argue persuasively that while Johnson provides a useful listing of criteria, it does nbot give the methodology by which such criteria are to be weighed or utilized. The Court finds nothing in the language of the cases above which would disapprove plaintiffs' suggested method of applying the Johnson criteria through the "lodestar" approach. The "lodestar" method contains three steps: (1) calculating the lodestar by multiplying hours times reasonable rates; (2) increasing the lodestar if warranted by reviewing certain "contingency" factors; and (3) examining various quality factors and increasing or decreasing the adjusted lodestar as appropriate. The Tenth Circuit has not required rigid consideration of all twelve of the Johnson criteria in every case. These twelve factors are:

1. Time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of other employment by the attorney due to acceptance of the case.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time limitations imposed by the client or the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation, and ability of the attorneys.
10. The "undesirability" of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

The first step, calculating the lodestar, requires that the Court determine a reasonable hourly rate for the services of plaintiffs' attorneys. This in turn requires consideration of Johnson factors 1, 3, 5, 9, and 12, primarily. Plaintiffs originally asked for an hourly rate of $100. The Court recognizes that considerable legal skill and effort was required by this case, and that plaintiffs' very experienced and able counsel provided such services. Furthermore, it is clear that reasonable rates must be allowed so that competent counsel will not refuse to undertake civil rights litigation. Nevertheless, we are unable to conclude that $100 per hour is a customary or typical award in these kinds of cases, particularly when it is remembered that the services were provided over as long a period as ten years. Plaintiffs acknowledge the differing approaches to allowing current rates as opposed to historical rates, but argue that all their attorneys' time should be compensated at the current rate of $100 per hour. Although we think their arguments therefor based on the declining purchasing power of money through inflation and delay in payment have some merit, we think that those matters are properly con-

sidered at the "multiplier" stage, rather than in determining a proper hourly rate.

At the hearing, plaintiffs submitted Exhibit 1 showing minimum historical rates ranging from $50 to $100 over the 11-year period from 1972 to 1982. Defendant UTU contends that the range was from $35 to $75 per hour over the same period of time. As a comparison, we set forth the figures reached under each contention, by which we calculate a weighted average:

| | | Plaintiffs | | Defendant UTU's | |
|---|---|---|---|---|---|
| YEAR | HOURS | RATES | YEARLY AMOUNT | RATES | YEARLY AMOUNT |
| 1972 | 70.90 | $50.00 | $ 3,545.00 | $35.00 | $ 2,481.50 |
| 1973 | 297.85 | 55.00 | 16,381.75 | 40.00 | 11,914.00 |
| 1974 | 354.60 | 60.00 | 21,276.00 | 45.00 | 15,957.00 |
| 1975 | 550.00 | 65.00 | 35,750.00 | 50.00 | 27,500.00 |
| 1976 | 619.60 | 70.00 | 43,372.00 | 55.00 | 34,078.00 |
| 1977 | 827.82 | 75.00 | 62,086.50 | 60.00 | 49,669.20 |
| 1978 | 1757.78 | 80.00 | 140,622.40 | 65.00 | 114,255.70 |
| 1979 | 609.54 | 85.00 | 51,810.90 | 65.00 | 39,620.10 |
| 1980 | 174.00 | 90.00 | 15,660.00 | 70.00 | 12,180.00 |
| 1981 | 1137.57 | 95.00 | 108,069.15 | 70.00 | 79,629.90 |
| 1982 | 1457.71 | 100.00 | 145,771.00 | 75.00 | 109,328.25 |
| TOTAL | 7857.37 | | $644,344.70 | | $496,613.65 |
| WEIGHTED AVERAGE HOURLY RATE | | | $82.05 | | $63.20 |

Again, the computed weighted average rates indicate a mathematical precision to which the determination of attorneys' fees is not in reality amenable. The Court will therefore round these figures to $82.00 and $63.00 per hour respectively, in keeping with their nature as approximations or estimates. Thus, based on the hours and a reasonable rate, without any consideration of the Johnson factors, plaintiffs' are contending for 7800 hours times a rate of $82.00, or approximately $639,600. Defendant UTU contends that the compensable hours should be limited to 5000, times an hourly rate of $63.00, or $315,000. The Court concludes that the weighted average of $63.00 per hour suggested by UTU is more nearly the reasonable rate, and should be applied to the 7800 hours which we have already found reasonable and compensable. The resulting "lodestar" figure is therefore $491,400.

The second step involves considering whether plaintiffs' contingency factors should be applied to increase the attorneys' fees awarded. These factors are listed by plaintiffs as (1) risks of litigation; (2) preclusion of other work [Johnson factor 4]; (3) undesirability of the case [Johnson factor 10]; and (4) delay in payment. Plaintiffs have requested a multiplier of .5 or 50% of the lodestar based on these considerations. While we do not consider the cases undesirable because of the fact they are civil rights cases, we do consider the other factors important. The risks of litigation, considering UTU's vigorous defense at all stages, were substantial, and the final outcome was, for much of the litigation, uncertain. We think the amount of effort required by this case did preclude other work for the attorneys. Most important, however, payment has been delayed in this uncertain case from five to ten years, depending on the individual attorneys.

The third and final step is to consider the "quality" factors, as they are characterized by plaintiffs. These include: (1) the quality of representation [Johnson factors 3 and 9, which were considered to some extent in setting the reasonable hourly rate]; (2) the complexity and novelty of the issues presented [Johnson factor 2]; and (3) the amount involved and the results obtained [Johnson factor 8]. The Court finds that these attorneys have provided very high quality representation of the class, and we consider the issues raised in this litigation, particularly the central one of the non-bona fide seniority system, to have been both novel and complex, requiring the high legal ability shown by counsel on both sides. Finally, the results obtained for plaintiff class are very favorable, and the total award approximates $6,000,000. Plaintiffs have also requested a multiplier of .5 or 50% of the lodestar based on the "quality" factors.

The file and the evidence herein clearly show that the various factors just discussed are appropriately considered by the Court and should increase the lodestar amount. However, we think it important to emphasize that the factors which we take into ac-

count are only the relevant considerations established to help guide us in the determination of a reasonable fee, and under the specific facts of the cases, the Court finds that the lodestar of $491,400 should be increased by a multiplier of .75 or 75% for all of the contingency and quality factors. The dollar amount of the multiplier is therefore $368,550, to be added to $491,400 for a total of $859,950. We conclude that this amount is fair and reasonable, and should therefore be allowed as and for the services rendered on behalf of plaintiff class by their attorneys. By Dkt. 463, Mr. Paup has represented to the Court that under the settlement of the class claims with defendant Santa Fe, $17,950 was paid as attorneys' fees. This amount should be deducted from the total fee allowed herein, leaving $842,000 to be included in the Judgment as attorneys' fees.

In addition to attorneys' fees, plaintiffs seek costs and expenses in the amount of $49,436.69. We have reviewed the itemization of plaintiffs' attorneys' submissions of costs, and find that such costs have been reasonably incurred and should be included in the Judgment. UTU has not objected to plaintiffs' attorneys' statements of their costs. From this total, $15,000 should be deducted for UTU's prepayment toward said expenses in that amount. An additional $94.00 will be deducted for costs paid by the Santa Fe in connection with the settlement between plaintiffs and the Santa Fe. Thus, the total award of costs to be included in the Judgment is $34,342.69. Judgment for plaintiffs and class members, payable to their attorneys as and for their reasonable fees in the amount of $842,000, and expenses of suit advanced in the amount of $34,342.69, will be entered by separate Order this day in the total amount of $876,342.69.

IT IS SO ORDERED.

**JOURNAL ENTRY OF JUDGMENT**

Now, on this 1st day of December, 1982, the above captioned consolidated cases come before the Court for entry of final

judgment. The plaintiffs, intervenors, and class members appear by and through their attorneys of record: Terry G. Paup, Wichita, Kansas; Lee H. Woodard, of Woodard, Blaylock, Hernandex, Pilgreen & Roth, Wichita, Kansas; Chester I. Lewis, of Lewis & Davis, Wichita, Kansas; and Jim L. Lawing, Wichita, Kansas. Defendant, United Transportation Union (UTU), appears by and through its attorneys of record, William B. Smith and William Sitzer, of Dubail, Judge, Kilker, O'Leary & Smith, St. Louis, Missouri; and E. Lee Kinch, Wichita, Kansas. Defendant Atchison, Topeka & Santa Fe Railway Company (Santa Fe) appears by and through its attorney of record, Thomas R. Conklin, Topeka, Kansas.

Thereupon, based upon the Court's prior findings and conclusions, and after reviewing the evidence, other matters of record, and hearing statements of counsel, the Court finds that a final judgment should be entered against defendant UTU and in favor of the plaintiffs, intervenors, and class members in the total amount of Eight Hundred Seventy-Six Thousand, Three Hundred Forty-Two Dollars and Sixty-Nine Cents ($876,342.69), representing an award of attorneys' fees in the amount of Eight Hundred Forty-Two Thousand Dollars and No Cents ($842,000.00), and costs in the amount of Thirty-Four Thousand Three Hundred Forty-Two Dollars and Sixty-Nine Cents ($34,342.69). Such total sum shall be paid to the four attorneys who have represented plaintiffs, intervenors, and class members herein. Each of these attorneys shall be entitled to receive his share of the total attorneys' fees award ($842,000.00) in the proportion which the hours set out by each name appearing at page 23 of the Court's Memorandum and Order entered this day bears to the total of such hours (7,857.37), less any payment for fees previously received. The costs ($34,342.69) shall be distributed among these attorneys according to the costs stated by them in their affidavits, less any payment for costs previously received.

The Court further finds that although the claim of plaintiff Ray Landrum remains for determination, and the issue of in-

tervention is reserved for future decision, there is no just reason for delaying the entry of final judgment as to attorneys' fees and costs. Further, it should be specifically and expressly directed that such final judgment be entered in favor of plaintiffs, intervenors, and class members and against defendant UTU in the amount of Eight Hundred Seventy-Six Thousand, Three Hundred Forty-Two Dollars and Sixty-Nine Cents ($876,342.69) as and for attorneys' fees and costs herein, as previously provided.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of plaintiffs, intervenors, and class members and against defendant UTU in the amount of Eight Hundred Seventy-Six Thousand, Three Hundred Forty-Two Dollars and Sixty-Nine Cents ($876,342.69), and that said Judgment is to be paid to and distributed among the attorneys for plaintiffs, intervenors, and class members as previously set forth herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no reason for delay in entry of this final Judgment and it is expressly directed such Judgment be entered.

With this Journal Entry of Judgment ($876,342.69) and the other Journal Entry of Judgment entered this day concerning the final back pay award to the class ($5,995,365.65), the total amount of the combined Judgments entered today in favor of plaintiffs, intervenors, and class members and against defendant UTU is Six Million, Eight Hundred Seventy-One Thousand Seven Hundred Eight Dollars and Thirty-Four Cents ($6,871.708.34).

IT IS THEREFORE FURTHER ORDERED, ADJUDGED, AND DECREED, that the last-stated total sum combining both Judgments entered today shall bear interest at the current Federal rate as provided by law until paid.

## JOURNAL ENTRY OF JUDGMENT

NOW, on this 29th day of November, 1982, the above-captioned consolidated cases come before the Court for entry of final judgment. The plaintiffs, intervenors and class members appear by and through their attorneys of record: Terry G. Paup, Wichita, Kansas; Lee H. Woodard, of Woodard, Blaylock, Hernandez, Pilgreen & Roth, Wichita, Kansas; Chester I. Lewis, of Lewis & Davis, Wichita, Kansas; and Jim L. Lawing, Wichita, Kansas. Defendant, United Transportation Union (UTU), appears by and through its attorneys of record, William B. Smith and William Sitzer, of Dubail, Judge, Kilker, O'Leary & Smith, St. Louis, Missouri; and E. Lee Kinch, of Ratner, Mattox, Ratner, Barnes & Kinch, Wichita, Kansas. Defendant Atchison, Topeka & Santa Fe Railway Company (Santa Fe) appears by and through its attorney of record, Thomas R. Conklin, Topeka, Kansas.

THEREUPON, based upon the Court's prior findings and conclusions, and after reviewing the evidence, other matters of record and hearing statements of counsel, the Court finds that a final judgment should be entered against defendant UTU and in favor of the plaintiffs, intervenors and class members for back wages in the total amount of Five Million Nine Hundred and Ninety Five Thousand Three Hundred and Sixty Five Dollars and Sixty Five Cents ($5,995,365.65). With respect to this judgment, the Court further finds:

First, the entire amount of the judgment shall be paid into the registry of the Clerk of this Court and, thereafter, the Clerk shall pay and distribute the same as set forth below;

Second, The Clerk shall withhold twenty-five percent (25%) of the judgment for the payment of any withholding liability of defendant UTU arising from the back pay relief granted herein;

Third, the Clerk shall invest the amount withheld in six-month United States Treasury Certificates until further order of the Court;

Fourth, the Clerk shall forthwith pay and distribute seventy-five percent (75__) of the judgment to plaintiffs, intervenors and class members in accordance with their individual claims previously found to be valid by the Court;

Fifth, the balance remaining after payment of all withholding liability of defendant UTU, if any, shall be paid to plaintiffs, intervenors and class members as their interest may appear and upon further order of the Court;

Sixth, that no distribution or payment of any back pay award shall be made hereunder to any plaintiff, intervenor or class member who has settled his individual claim for back pay with defendant UTU, and all matters relating to such settlement shall be governed by a separate order of this Court.

In addition, the Court finds that the Application of plaintiffs, intervenors and class members for attorneys' fees and expenses of litigation should be taken under advisement and that the Court will enter a judgment for the same at a future date under a separate Order.

The Court further finds that although the claim of plaintiff Ray Landrum remains for determination and even though the issues of intervention and attorneys' fees and costs are reserved for future decision, there is no just reason for delaying the entry of final judgment on the claims of plaintiffs, intervenors, and class members for back wages; and, it should be specifically directed that such final judgment be entered in favor of plaintiffs, intervenors, and class members in the amount of Five Million Nine Hundred and Ninety Five Thousand Three Hundred and Sixty Five Dollars and Sixty Five Cents ($5,995,365.65) as previously provided.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiffs, intervenors, and class members and against defendant UTU in the amount of Five Million Nine Hundred and Ninety Five Thou-

sand Three Hundred and Sixty Five Dollars and Sixty Five Cents ($5,995,365.65) and that said judgment shall be paid and distributed as set forth in the findings of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay in entry of this final judgment and it is expressly directed such judgment be entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of the amount for attorneys' fees and expenses of litigation to be granted plaintiffs, intervenors, and class members is taken under advisement and such shall be awarded by a separate judgment and order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other costs of this action shall be taxed to defendant UTU.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4963

Joe Vernon Sears, an individual,
in person, and for all other
persons similarly situated,
Plaintiffs,

and The Brotherhood of Sleeping
Car Porters, and Ray E. Landrum, et al.,
Intervenor-Plaintiffs,

vs.

The Atchison, Topeka & Santa Fe
Railway Company and United
Transportation Union, successor
to Brotherhood of Railway Trainmen,
Defendants.

(Consolidated)

Civil Action No. W-4946

Mildred Collins, Executrix of the
Estate of James Collins, Jr.,
Plaintiff,

vs.

United Transportation Union,
Defendant.

**MEMORANDUM AND ORDER**

Filed Feb. 16, 1983

There are now before the Court four post-judgment motions requiring rulings by the Court. The first of these is the motion for substitution by Oneil Davis, administrator of the estate of deceased class member Porter Burton, who died on June 19,

1982 (Dkt. 509). This motion is unopposed, and it will be granted.

The second motion is the motion to intervene, or in the alternative, for consolidation and re-definition of the class herein, filed by John H. Blankenbaker, and other black chair car attendants who worked for the Santa Fe at some time from July 2, 1965 to the present (Dkts. 528, 538, and 539). In the Memorandum and Order of December 1, 1982, Dkt. 504, the Court recited the background of this motion and deferred its ruling to allow the parties to submit additional briefs on the matter. Those briefs have now been received, and the Court is fully advised as to the respective positions of the parties and of movants. At the hearings in late November, 1982, the Court suggested to movants' counsel that he should file a separate action on behalf of the chair car attendants so that their rights would be fully protected. He did so, and that action is *Blankenbaker, et al. v. United Transportation Union, et al.*, Case No. 82-1984.

We need not here repeat what waas said in Dkt. 504. After careful consideration, the Court has decided that the motion should be denied. The first of the alternatives suggested by movants is that they be allowed to intervene in this action, even though they are not members of the class certified herein. Movants apparently feel they are directly entitled to the benefit of some holdings in this case, particularly in regard to the liability of the defendants, though they have never been parties to this action. We find this position to be incorrect. If the judgment entered herein has collateral estoppel effects upon the claims of the chair car attendants against these defendants, those effects will not be diminished because applied in the chair care attendants' separate action, hor would they be enhanced by intervention or class expansion here.

Furthermore, there are many factual and legal differences between the present train porters' suit and the claims of the mo-

vant chair car attendants. One of the most significant is the fact that this action was tried on a stipulation of facts which does not exist in connection with the movants' claims. A second crucial difference is the existence of a settlement between the Santa Fe and the train porters, which has no application to the chair car attendants. Judgment in favor of the train porter class has already been entered herein. Intervention would be particularly improper at this late date, especially in view of the dubious similarity between the questions of fact and law in movants' claims, and those in the train porters' action.

For similar reasons, the alternative motion of movants to redefine the class so as to include them herein is also properly denied. The claims of the chair car attendants are not typical of those of the train porter class, and thus movants should not be joined in the class under Rule 23)a), F.R.Civ.P. Rule 23(c) states that class certification decisions will be made as soon as practicable, and may be altered *before* decision on the merits. It is only the train porter class which has established its claims by evidence and for whom judgment was entered. It would be patently unfair to apply that judgment to another class of claimants now, whose unproven claims are not in common with the train porters'.

Movants' third suggested alternative is consolidation of their separate action with the one now before us. Rule 42(a), F.R.Civ.P., provides that a court may order joint trial of matters in issue in actions involving a common question of law or fact. Again, the Court finds that any shared legal or factual issues between the chair car attendants and the train porters are outweighed by those issues which differ. Because of these dissimilarities and the late stage of the present class action, consolidation as requested by movants will also be denied. However, the Court noted in Dkt. 504 that the claim of Ray E. Landrum, plaintiff-intervenor who was a chair car attendant and not within the train porter class, would remain for adjudication after the train porter judgment. It appears to the

Court that Mr. Landrum's claim does involve questions of law and fact in common with those asserted in the chair car attendants' separate action, No. 82-1984. The Court is therefore inclined to order Mr. Landrum's claim and action consolidated with Case No. 82-1984, unless there is some objection. The parties will be prepared to address this issue at the hearing which is granted herein below.

The third matter needing the Court's attention is plaintiffs' various motions under Rule 59(e), F.R.Civ.P., to make additional findings of fact, and to amend or alter the Judgment (Dkt. 506) and the Memorandum and Order (Dkt. 504) relating to attorneys' fees and costs. The docket entries concerned are Dkts. 514, 515, 516, 517, 518, 519, 529, 534, 535, and 540. Plaintiffs have requested oral argument on the motions.

Plaintiffs first assert that estate administration expenses for ten deceased class members were inadvertently omitted from the costs awarded. The Court's review of the file convinces us that these expenses were omitted, but should be included. Thus, the Court anticipates increasing the Judgment for costs by $7,130.00, from $34,342.69 to $41,472.69. However, the Court will not do so at this time, but will await plaintiffs' final statement of total costs incurred.

Second, Mr. Lawing, representing Mildred Collins, files a separate motion (Dkt. 518) to amend the attorneys' fees Judgment with respect to the Court's disallowance of his hours in connection with the November 23 and 24 hearings. He argues that this ruling forces counsel to donate their services in the final stages of litigation, while counsel for defendants are being paid by their clients for attendance at the same hearings. Allowing UTU to avoid these legitimate plaintiffs' attorneys' fees, he continues, gives it a windfall when it itself was the wrongdoer. Mr. Lawing asks the Court to allow counsel for all plaintiffs to submit within thirty (30) days any additional time they have expended since their last affidavits. He also requests expenses for the fees of expert witnesses called on plaintiffs' behalf at the

November 23 and 24 hearings. The Court will defer ruling on this motion until the hearing referred to below.

Plaintiffs' third request is that the weighted average hourly rate used by the Court in determining attorneys' fees be increased from $63.00 to $106.27. Mr. Paup filed the original motion for additional attorneys' fees and urged only that his proportionate fees should be increased. His basis for the motion was that he and the class members he represents had done the bulk of the work for the class. Thereafter, Messrs. Woodard, Lewis, and Lawing filed a single motion on behalf of the class members they represent, seeking their proportionate share of the same increase requested by Mr. Paup. They rely on Mr. Paup's brief, but do not join in his motion. Consequently, there are two separate motions before us concerning the reasonableness of the fees allowed, but the arguments advanced in support are the same. The discussion which follows treats the motions together, and uses combined total figures.

Plaintiffs argue first that the Court used an unreasonably low rate for each of the years in question, that is $35 in 1972 to $75 in 1982. The evidence adduced, they contend, does not support the Court's finding that these were the prevailing rates paid to experienced Wichita attorneys during the years in question. Moreover, these rates are lower than those plaintiffs' attorneys were actually paid by other clients in the years in question, they aver, as well as lower than UTU's counsel stated they charged in those years. Plaintiffs urge adoption of their rates, i.e. $50 in 1972 to $100 in 1982, which would result in a weighted average hourly rate of $82.05.

Secondly, plaintiffs assert that regardless of the hourly rates found by the Court to prevail in each of the years in question, those rates must be adjusted upwards to take into account two distinct factors. These are dely in payment, and the declining purchasing power of money through inflation. It is contended that the Court failed to recognize this distinction, and as a result failed to consider the effects of inflation in its award of at-

torneys' fees. Their argument is that the devaluation of money resulting from inflation from 1972 to 1982, and therefore the proper amount of the rate increase, can be ascertained from the Consumer Price Index. Upward adjustment of the rates by the CPI will recongize that because the fees are to be paid in 1982 dollars, which are worth less than 1972 dollars for example, the hourly rate must be increased above $35 in 1982 to give an effective $35 per hour rate for 1972.

Plaintiffs of course contend for use of their rates, which results in an unadjusted weighted average of $82.05 per hour. With the inflation CPI adjustment, their weighted average would be increased from $82.05 to $106.27 per hour, increasing the total attorneys' fees award (including the multiplier, less adjustments for amounts previously received) from $859,950.00 to $1,396,241.88. However, plaintiffs urge that even if the Court adheres to its $35-$75 range, the $63.00 weighted average should be adjusted upwards by the inflation/CPI factor to $81.32. This would increase the total attorneys' fees award by $194,359.38 (including the multiplier, less adjustment for amounts previously received), from $859,950.00 to $1,054,309.38.

The opinion of the Tenth Circuit in *Cooper v. Singer,* ____ F.2d ____, Case Nos. 81-2016 and 81-2113, dated September 30, 1982, has been withdrawn and the judgment vacated, pending rehearing *en banc.* Furthermore, the amount of the fees awarded is vigorously contested. Because *Cooper v. Singer, supra,* was one of the cases the Court relief upon in determining attorneys' fees, and to provide the parties a full opportunity to present their positions, the Court will grant the requested oral argument on the motions to alter or amend the Memorandum and Order and Judgment relating to attorneys' fees and costs. The Court will schedule a hearing on the motions for the first available date after May 1, 1983, and counsel will be notified.

At such time, the Court will consider any additional arguments and evidence required to finally determine the issues

submitted. We have heretofore advised counsel to submit their complete statements of fees and expenses prior to hearings which were set, later continued, and finally heard over the course of several days. Nevertheless, the Court has repeatedly received post-hearing affidavits and briefs concerning supplemental statements of attorneys' hours and expenses. All counsel for plaintiff class are specifically directed to supply the Court at or before the hearing with the final total hours, fees, and expenses they claim. This shall be done in two summary exhibits, one for expenses and one for attorneys' fees. The Attorneys' fees exhibit shall, if the hours claimed total more than 7800, show fees based on such hours computed in the manner used by Dr. Terrell in his affidavit attached to Dkt. 515. The summary exhibits shall also show deductions for any amounts previously received, and shall be supported by attached final affidavits of each of the attorneys for plaintiffs.

The final Judgment, Dkt. 505, concerning the relief to which members of the class are entitled, is unaffected by the granting of plaintiffs' request for oral argument on the motions to amend or alter the Judgment as to attorneys' fees. There have been no post-judgment motions filed in this Court concerning the Judgment for the class members, Dkt. 505. However, at the hearing mentioned above, counsel for all parties should also be prepared to discuss the Opinion of the Court of Appeals for the Tenth Circuit filed December 1, 1982 in *Strey v. Hunt Int'l. Resources Corp.*, ____ F.2d ____, Case Nos. 82-1775 and 82-1830, as it relates to the finality of the Judgment, Dkt. 505, herein.

The last motion to be ruled upon is plaintiffs' application for interim attorneys' fees and costs (Dkts. 525, 526, 533, and 541). UTU argues that this is not an application for interim attorneys' fees but rather an untimely motion to amend the Judgment of December 1, 1982, Dkt. 506, under Rule 52(b). Thus, UTU contends that this Court does not have jurisdiction to order the immediate payment of some portion of the fees awarded by the

Judgment, Dkt. 506. We hold the motion is a proper one for interim attorneys' fees and costs, and does not necessarily involve Dkt. 506 at all, except insofar as any interim award will ultimately reduce the final award. Even if the UTU were correct in its characterization of the application, we would deem plaintiffs' other timely motions to alter or amend the Judgment, Dkt. 506, sufficient to retain jurisdiction in this Court to make any change we find jusitifed in such Judgment. It is not unusual in protracted cases for courts to allow prevailing plaintiffs interim fees and costs. *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 358-359 (5 Cir. 1977), cert. denied 434 U.S. 1034, 54 L.Ed.2d 781, 98 S.Ct. 767 (1978). For the reasons stated in *James,* the Court finds that interim fees and costs are justified and should be awarded in this lengthy case. Plaintiffs' seek interim fees in an amount of $324,900.00 and $27,397.57 in costs, for a total interim award of $352,297.57. The Court finds the fees requested to be reasonable, being less than the "lodestar" figure of $491,400.00 previously found appropriate by the Court. Similarly, the costs requested are below those to which the Court has heretofore found plaintiffs entitled.

Pursuant to the foregoing, IT IS HEREBY ORDERED:

1. That the motion for substitution of Oneil Davis, administrator of the estate of deceased class member Porter Burton, be and hereby is GRANTED, and that the said Oneil Davis be and hereby is substituted as a class member in this action in place of the said Porter Burton.

2. That the motion of Mr. Blankenbaker and other chair car attendants to intervene, or in the alternative, for consolidation and re-definition of the class herein, be and hereby is DENIED.

3. That plaintiffs' request for oral argument on their motions to make additional findings of fact, and to amend or alter the Judgment, Dkt. 506, and the Memorandum and Order (Dkt. 504) relating to attorneys' fees and costs, be and hereby is GRANTED. Those matters specifically noted above, and any

other matters necessary for final resolution and judgment in this action, will be taken up by the Court at this hearing, which shall be set at a future time.

4. That plaintiffs' application for interim attorneys' fees and costs be and hereby is GRANTED. That defendant UTU be and hereby is directed to pay into the registry of the Clerk of this Court the sum of Three Hundred Fifty-Two Thousand, Two Hundred Ninety-Seven Dollars and Fifty-Seven Cents ($352,297.57) on or before March 1, 1983, as an interim award of attorneys' fees and costs incurred herein by plaintiffs and class members. Said amount represents Three Hundred Twenty-Four Thousand, Nine Hundred Dollars ($324,900.00) in attorneys' fees and Twenty-Seven Thousand, Three Hundred Ninety-Seven Dollars and Fifty-Seven Cents ($27,397.57) in costs, which amounts will be credited against the total attorneys' fees and costs finally awarded to plaintiffs and against defendant UTU.

That upon receipt of said interim attorneys' fees and costs, the Clerk is directed to pay out the following sums to the following persons:

(a) Two Hundred Thousand, One Hundred Ninety Dollars and Sixteen Cents ($200,190.16), representing One Hundred Eighty-Two Thousand Dollars ($182,000.00) in attorneys' fees, and Eighteen Thousand, One Hundred Ninety Dollars and Sixteen Cents ($18,190.16) in costs, to Terry G. Paup, Esq.;

(b) Seventy-Six Thousand, Two Hundred Twelve Dollars and Eighty-Eight Cents ($76,212.88), representing Sixty-Nine Thousand, Four Hundred Eighty-Five Dollars ($69,485.00) in attorneys' fees and Six Thousand, Seven Hundred Twenty-Seven Dollars and Eighty-Eight Cents ($6,727.88) in costs, to Lee H. Woodard, Esq.;

(c) Four Thousand, Two Hundred Twenty-Two Dollars and Fifty Cents ($4,222.50) representing attorneys' fees, to Jim L. Lawing, Esq.

The Clerk is further directed to retain the sum of Seventy-One Thousand, Six Hundred Seventy-Two Dollars and Three Cents ($71,672.03), representing Sixty-Nine Thousand, One Hundred Ninety-Two Dollars and Fifty Cents ($69,192.50) in attorneys' fees and Two Thousand, Four Hundred Seventy-Nine Dollars and Fifty-Three Cents ($2,479.53) in costs, due Chester I. Lewis, subject to determination of the claims of the United States to any amounts due Chester I. Lewis. The Clerk shall invest said sum of $71,672.03 in a Certificate of Deposit until further order of the Court.

IT IS SO ORDERED.

Dated this 14 day of February, 1983.

/s/ Wesley E. Brown
United States District
Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4963

Joe Vernon Sears, an individual,
in person, and for all other
persons similarly situated,
Plaintiffs,

and The Brotherhood of Sleeping
Car Porters, and Ray E. Landrum, et al.,
Intervenor-Plaintiffs,

vs.

The Atchison, Topeka & Santa Fe
Railway Company and United
Transportation Union, successor
to Brotherhood of Railway Trainmen,
Defendants.

(Consolidated)

Civil Action No. W-4946

Mildred Collins, Executrix of the
Estate of James Collins, Jr.,
Plaintiff,

vs.

United Transportation Union,
Defendant.

**ORDER**

Filed May 13, 1983

In this Court's Memorandum and Order filed February 16, 1983, Dkt. 544, we granted plaintiffs' request for oral argument on their motions to make additional findings of fact, and to

amend or alter the Judgment, Dkt. 506, and the Memorandum and Order, Dkt. 504, relating to attorneys' fees and costs. Additionally, the Court called attention to other specific matters to be taken up at such hearing. On May 5, 1983, this hearing was held for the purpose of finally resolving all pending matters as to the train porter class. Having heard the various motions and arguments of counsel, and having thoroughly reviewed the file and being fully advised in the premises, the Court now rules on such motions, which we take up seriatim.

1. **Motion for Substitution by Oneil Davis, Administrator of the Estate of deceased plaintiff-intervenor and class member Carl E. Chester, Dkt. 555.**

Carl E. Chester died on November 6, 1982. The motion for substitution is unopposed, and it is hereby GRANTED. The said Oneil Davis is hereby substituted as a class member and plaintiff-intervenor in this action in place of the said Carl E. Chester.

2. **Proposed Consolidation of Ray E. Landrum's claim with the chair car attendants separate action, *Blankenbaker, et al. v. United Transportation Union, et al.*, Case No. 82-1984, and Defendant UTU's Motion to Dismiss the claim of Ray E. Landrum, Dkt. 552.**

In the Court's Memorandum and Order of February 16, 1983, Dkt. 544, we stated that it appeared that Mr. Landrum's claim should be consolidated with Case No. 82-1984, unless there was some objection. UTU has filed its memorandum opposing the contemplated consolidation, and with it, a motion to dismiss Mr. Landrum's claim, Dkt. 552. At the May 5, 1983 hearing, plaintiff-intervenor Landrum and the chair car attendants who earlier sought to intervene in this action, Case No. W-4963, also opposed consolidation of Mr. Landrum's claim

with the chair car attendants' separate action, *Blankenbaker, et al. v. United Transportation Union, et al.,* Case No. 82-1984. Contemporaneously, the chair car attendants moved for reconsideration of this Court's Orders, Dkts. 544 and 551, in which their motion to intervene in W-4963, have their separate action, No. 82-1984, consolidated with W-4963, and be designated as an additional class or sub-class herein was denied. The motion for reconsideration of the Court's denial of the chair car attendants' previous motion is hereby GRANTED, and the prior Orders of the Court, Dkts. 544 and 551, as to such motion are hereby withdrawn. The claim of Ray E. Landrum has necessarily been separated from the train porters' claims, on which final Judgment has been rendered, and Mr. Landrum's claim remains for adjudication in Case No. W-4963. At this time it will not be consolidated with *Blankenbaker, et al. v. United Transportation Union, et al.,* Case No. 82-1984. The Court will withhold its ruling on these matters until further briefs addressing them are received. Movant chair car attendants and Mr. Landrum are granted thirty days in which to submit their briefs to the Court, and the parties herein shall have thirty days thereafter to submit their responses. The Court finds that the motion to dismiss Mr. Landrum's claim is premature at this time, and therefore declines to rule thereon.

**3. Chair car attendants' Motion for Additional Time to File Notice of Appeal, Dkt. 556.**

Due to the withdrawal of the Court's prior Orders, Dkts. 544 and 551, relating to the motion of the chair car attendants, we deem this motion for extension of time moot. We believe there to be no present final Order of this Court as to the chair car attendants, including Mr. Landrum, from which an appeal could be taken.

**4. Plaintiffs' Motions to Amend or Alter the Judgment, Dkt. 506, and the Memorandum and Order, Dkt. 504, relating to Attorneys' Fees and Costs, Dkts. 514, 515, 516, 517, 518, 519, 529, 534, 535, 540, 544, 554, 557, 558, 559, 561, and 562.**

**a. Allowance of hours and expenses claimed in final affidavits by plaintiffs' attorneys.**

On Pate 23 of its Order, Dkt. 504, dated December 1, 1982, the Court set out the hours claimed by each of plaintiffs' attorneys, which totalled 7,857.37 hours. This total was rounded to 7,800.00 by the Court, and the Judgment for fees and costs, Dkt. 506, awarded each attorney his proportionate share of the total fees award. Each of plaintiffs' attorneys has now submitted supplemental affidavits for services rendered since his prior affidavits and extending through April 15, 1983. Thus, Mr. Paup seeks fees for an additional 228.50 hours, Dkt. 559; Mr. Woodard for an additional 41.0 hours, Dkt. 561, Mr. Lewis for an additional 55.40 hours, Dkt. 554, and Mr. Lawing for an additional 37.30 hours, Dkts. 503 and 558.

The Court's examination of these most recent affidavits shows that Mr. Paup expended approximately 72.00 hours in connection with the Motion to Amend the Judgment relating to attorneys' fees. Each of the other three attorneys for the class spent approximately 2.00 hours on the attorneys' fees matter. This motion, while completely proper, was obviously a motion for reconsideration of issues which the Court previously determined by its Order and Judgment, Dkts. 504 and 506, and thus was solely for the benefit of plaintiff class and its attorneys. Moreover, the primary reason for the May 5, 1983 hearing was to allow plaintiffs to orally argue and fully present their motion to amend the Judgment. For this reason, we believe it would be unfair to charge UTU with attorneys' fees in connection with this motion or the May 5 hearing. With the exception of the hours stated above, however, the Court will allow reasonable attorneys' fees for additional hours submitted by plaintiffs' attorneys. The Court finds that the current reasonable rate to be

applied to such hours is $85.00 per hour. There has been no delay in payment of these fees, and no other "contingency factors," as listed in Dkt. 504, are involved. The "quality factors" mentioned therein, however, do still apply to the efforts of the attorneys on behalf of the class. Thus, in accordance with its prior Memorandum and Order, Dkt. 504, the Court will increase the "lodestar" amount for additional hours by a multiplier of .40 or 40%. Additional attorneys' fees will be awarded by a separate Judgment according to the following schedule:

| | Addl. Hours Claimed | Less | Hours Re Atty. Fees | = | Total Hours | $85 Per × Hours | + 40% |
|---|---|---|---|---|---|---|---|
| **Terry Paup** | **228.50** | – | (72.00) | = | 156.50 | $13,302.50 | $18,623.50 |
| Lee Woodard | 41.00 | – | ( 2.00) | = | 39.00 | 3,315.00 | 4,641.00 |
| Chester Lewis | 55.40 | – | ( 2.00) | = | 53.40 | 4,539.00 | 6,354.60 |
| Jim Lawing | 37.30 | – | ( 2.00) | = | 35.30 | 3,000.50 | 4,200.70 |
| Total | 362.20 | – | (78.00) | = | 284.20 | $24,157.00 | $33,819.80 |

The Court has reviewed the itemization of each submission of additional costs, and finds such costs have been reasonably incurred and should be included in the separate Judgment referred to above. UTU has not objected to plaintiffs' attorneys' statement of their costs. As the Court mentioned in Dkt. 544, estate administration expenses for deceased class members incurred by Mr. Paup were inadvertently omitted from the previous costs awarded, and will be included here. The motion to amend Judgment, Dkt. 506, Dkts. 514 and 519, in this respect, is GRANTED. Additional costs will be assessed according to the following schedule:

| | | |
|---|---|---|
| Terry Paup | $14,404.31 | (Dkt. 559; includes $7,843.00 in estate administration expenses) |
| Lee Woodard | 1,573.25 | (Dkt. 561) |
| Chester Lewis | 5,106.27 | (Dkt. 554) |
| Jim Lawing | - 0 - | |
| Total | $21,083.83 | |

**b. Mr. Lawing's Motion concerning disallowance of hours for services he rendered on behalf of Mrs. Collins in connection with the hearings on November 23 and 24, 1982, Dkt. 518.**

Because additional services have been required on behalf of the class by all their attorneys, and the Court has been required to review such hours, Mr. Lawing's motion is GRANTED. All his hours have been included in determining additional attorneys' fees, except two (2) hours in connection with this rehearing on fees, as noted hereinabove. Obviously, the Court has also allowed hours by the other class attorneys for their participation in the November 23 and 24, 1982 hearings.

**c. Reasonableness of the attorneys fees allowed in the Judgment, Dkt. 506.**

We will not repeat our summary of plaintiff class' contentions in this regard, which was set out in the Court's Memorandum and Order of February 16, 1983, Dkt. 544. The Court holds that it did not use an unreasonably low rate in determining attorneys' fees, and that the rates used were supported by the evidence presented. Thus, the Court adheres to its finding as to reasonable hourly rates for attorneys in this area.

The second complaint of plaintiffs with respect to attorneys' fees is that the Court failed to give specific consideration to the effects of inflation, and to adjust the fees upward accordingly. The Court did specifically refer only to delay in payment in discussing the "contingency factors" on pages 27 and 28 of its Memorandum and Order, Dkt. 504. However, this was merely a "shorthand" reference to both delay in payment, and the declining purchasing power of money through inflation, which effect results from delay in payment. The Court did not, as plaintiffs suggest, either fail to recognize the economic difference between the effects of inflation and mere delay in payment, or fail to consider inflation in increasing the "lodestar"

by the multiplier. On the contrary, specific and independent consideration of the effects of inflation is reflected in the Court's increase of the "lodestar amounty by 75%. As stated at the top of page 26, Dkt. 504:

> Although we think (plaintiffs') arguments...based on the *declining purchasing power of money through inflation and* delay in payment have some merit, we think that those matters are properly considered at the "multiplier" stage ....(Emphasis added).

The Court does not think itself bound, as plaintiffs suggest, to increase attorneys' fees by the Consumer Price Index as an exact calculation of the effects of inflation. The Court's duty is to assess reasonable fees, which question we consider less amenable to exact computation than lost wages for the class members. In that regard, by agreement of the parties, the CPI was not used even there as part of the interest component for back pay relief, Dkt. 479. Again, we do not dispute Dr. Terrell's conclusion that so-called "interest" to offset delay in payment is a matter separate from the declining purchasing power of money. But we cannot agree that it is reasonable to apply the CPI to attorneys' fees in a simplistic, arithmetical manner: We do not think it proper to treat the attorneys' fees to be awarded as fully subject to adjustment for inflationary trends. To do so, by simply increasing the fees by the CPI, would assume that the fees were not only earned, but also due in earlier years. Nevertheless, the effects of inflation should be considered to some extent. Such due consideration, which is unavoidably inexact, is reflected as part of the .75 or 75% multiplier. The Court remains convinced that it has allowed plaintiffs' reasonable attorneys' fees for those hours included in Dkt. 504 and Dkt. 506. Said Judgment, Dkt. 506, and the portion of the Order, Dkt. 504, relating to attorneys' fees, are hereby REAFFIRMED, and the motions to alter and amend same, Dkts. 515 and 517, are DENIED.

IT IS SO ORDERED.

At Wichita, Kansas this 13th day of May, 1983.

/s/ Wesley E. Brown
United States District Senior Judge

Office - Supreme Court, U.S.
FILED
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No. 84-1173

# In the Supreme Court of the United States

**OCTOBER TERM, 1984**

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN,
a labor organization,
*Petitioner,*

vs.

JOE VERNON SEARS, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 7

1. Both of the Tenth Circuit's decisions in this case are consistent with the applicable decisions of this Court; no important question of federal law is involved herein which has not been, but should be, settled by this Court ..... 7

   a. This Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) is not in conflict with any of the decisions in this case; no important question of federal law has been decided herein which has not been, but should be, settled by this Court ..... 7

   b. This Court's decision in *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982) is not in conflict with any of the decision of the District Court or Tenth Circuit ..... 9

   c. The Tenth Circuit properly applied Rule 52(a) of the Federal Rules of Civil Procedure herein; there is no conflict hereinbelow with this Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1983) ..... 10

   d. This Court's decision in *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982) is not in conflict with any of the decisions hereinbelow 10

2. The relief afforded to the class herein, including the sum designated as the Tax Component, is in accord with this Court's decision in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), and with other

applicable decisions of this Court; no important or recurring question of federal law is involved herein which has not been but should be, settled by this Court ..... 11

3. The Petitioner herein waived any purported right under 42 U.S.C. §2000e-5(g) to claim that the District Court should have determined the relative degree of responsibility of the labor union and the railroad employer herein for the back pay award; no important or recurring question of federal law was decided by the Tenth Circuit nor do the circumstances herein afford an adequate factual context for this Court to settle any important federal question which has not been, but should be, settled by this Court ..... 13

CONCLUSION ..... 15

## CITATIONS

### Cases

*Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975) ..... 12

*American Tobacco Company v. Patterson*, 456 U.S. 63 (1982) ..... 10, 11

*Blim v. Western Electric Company, Inc.*, 731 F.2d 1473 (10th Cir.), ..... U.S. ....., 105 S.Ct. 233, 83 L.Ed.2d 161 (1984) ..... 13

*Bowen v. United States Postal Service*, 459 U.S. 212 (1983) ..... 14

*Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) ..... 7, 8, 13

*General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982) ..... 9, 10
*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) ..... 2
*Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) ..... 12
*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ..... 2, 4, 5, 10
*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ..... 2
*Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980) ..... 12, 13
*Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981) ..... 14
*Pearson v. Western Electric Company*, 542 F.2d 1150 (10th Cir. 1976) ..... 12
*Pullman-Standard v. Swint*, 456 U.S. 273 (1983) ..... 10
*Vaca v. Sipes*, 386 U.S. 171 (1967) ..... 14

**Statutes**

Rule 52, Federal Rules of Civil Procedure ..... 10
29 U.S.C. §185(a) ..... 14
42 U.S.C. §1981 ..... 9
42 U.S.C. §2000e et seq. ..... *passim*
42 U.S.C. §2000e-2(h) ..... 3, 5, 10, 11
42 U.S.C. §2000e-5(g) ..... 13

**Administrative Decisions**

Award 19324, National Railroad Adjustment Board, First Division (October 14, 1959) ..... 4

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

This case arises from a racial discrimination complaint filed by the Plaintiff Joe Vernon Sears with the Kansas Commission on Civil Rights on March 8, 1966 and with the Equal Employment Opportunity Commission (EEOC) on October 4, 1966 against the Atchison, Topeka & Santa Fe Railway Company (Santa Fe) and the United Transportation Union's predecessor. On November 1, 1972, following the issuance of a Right to Sue letter by the EEOC, Sears filed, in a timely manner, a class action complaint on behalf of Santa Fe Train Porters alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., by the Santa Fe and the United Transportation Union (UTU).

This suit alleged and was tried upon two Title VII liability theories: i.e., claims of "disparate treatment" in its hiring practices against Santa Fe [See e.g. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)], and claims of "disparate impact" of their unlawful seniority systems upon the class against both Santa Fe and the UTU [See e.g. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971)]. [Appendix to Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (A) at pages 45-46, 49, 56-57, 64, 67].

Following class certification, the District Court held a hearing after appropriate notice and approved a compromise and dismissal of all back pay and attorneys fees claims between Santa Fe and the Class, except for five (5) Class Members. (Id. at 11-14).[1] Thereafter, the trial of this matter was bifurcated and tried to the District Court in two phases upon an extensive joint presentation by the Plaintiffs and Class Members, the Santa Fe and the UTU of stipulated facts, stipulated summaries of the testimony of witnesses and numerous stipulated exhibits.

On June 14, 1978, the Trial Court entered its decision on the liability aspects of this case (Id. at 15-62), finding in favor of the Plaintiffs and Class Members and against the Santa Fe and the UTU on a "disparate impact" theory, holding that the Santa Fe's and UTU's seniority systems perpetuated, post-Act, the effect of such defendants' prior discriminatory practices towards the class (Id. at 42-49). The Trial Court applied the four factors set forth in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 at 355-356 (1977) [*Teamsters*], to determine that

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1. Prior to trial, Santa Fe entered into Covenants Not to Sue with these five Class Members but remained an active party in this proceeding until the entry of the carry-over seniority relief. (Id. at 126-131).

the Santa Fe's and UTU's seniority systems were created and maintained with the racially discriminatory intention of depriving the Class Members of brakeman and conductor jobs and concluded that the seniority systems were not *bona fide* under Section 703(h) of Title VII [42 U.S.C. §2000e-2(h)]. (A at pages 50-57). Lastly, the District Court concluded that the Class Members had proven their "disparate treatment" case against the Santa Fe (Id. at 45-46, 58-61).

On October 23, 1978, the Trial Court entered its decision establishing the principles which would govern the seniority and back pay relief to be afforded to the Class Members and the framework for awarding such relief. (Id. at 63-82). In this regard, the District Court noted that it had already concluded:

> [T]hat the seniority system entered into between the UTU or its predecessors and the Santa Fe was not bona fide under 703(h) of Title VII, because it had its genesis and was created and maintained in racial discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). . . . Liability was therefore properly imposed on a discriminatory impact theory for the perpetuation of past discrimination by the invalid seniority system after the effective date of Title VII. We held that the UTU was equally responsible with the Santa Fe for the creation and maintenance of the invalid seniority system, and that creation and maintenance of the invalid seniority system, and that liability could be imposed on the UTU. Monetary relief and attorneys' fees may be awarded against the UTU, while seniority relief may be awarded against both the UTU and the Santa Fe. Seniority relief was also held an appropriate remedy

against the Santa Fe for the post-Act discrimination against the plaintiff class. The Court held that the UTU engaged in no post-Act discriminatory conduct against the plaintiffs. (Id. at 64).

In fashioning the actual relief, the District Court divided the Class Members into two different groups or subclasses; i.e., ones who had retained the right to work as Train Porters after Title VII went into effect and those whose Train Porter seniority rights had been abrogated by virtue of Award 19324 of the National Railroad Adjustment Board on October 14, 1959.[2]

Citing *Teamsters*, the District Court ruled that the Train Porter group who had lost its seniority rights were only entitled to seniority relief by virtue of the Santa Fe settlement. (Id. at 68 and 72-73). The District Court further held that the other group would be treated as newly hired brakemen, as of the effective date of Title VII, for the purposes of seniority relief against both the Santa Fe and the UTU and for the purposes of computing back pay awards against the UTU under its formula. (Id. at 69-72).

Both the UTU and Santa Fe appealed the District Court's liability decision to the United States Court of

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2. Commencing not later than 1920, the UTU's predecessors, through letter requests, demands, legislative lobbying and proceedings before the Train Service Board of Adjustment, the National Railroad Adjustment Board, First Division and various other courts, had sought to eliminate the Train Porter position on Santa Fe and acquire these braking positions for their membership. (Id. at 31-33). Relying primarily upon their seniority rights under their labor agreements with Santa Fe and their status as the certified bargaining representative for Santa Fe brakemen, the union was ultimately successful in abolishing the Train Porter position on Santa Fe in 1959. Only those train porters who had seniority rights prior to April 20, 1942 retained any right to perform braking duties on the Santa Fe after Award 19324. (Id.).

Appeals for the Tenth Circuit (Tenth Circuit). All parties—the UTU, the Santa Fe and the Class Members—appealed the District Court's remedy decision. On March 11, 1981, the Tenth Circuit affirmed in part, reversed in part, and remanded this case to the District Court for further proceedings consistent with its opinion.

As its opinion discloses, the Tenth Circuit affirmed all of the District Court's factual findings regarding the liability of the defendants for the racially discriminatory effect of the seniority systems upon the Class. Although the Tenth Circuit concluded that the District Court had erred, as a matter of law, in its application of two of the four *Teamsters* factors to the facts herein (Id. at 94-95), it affirmed the District Court's underlying conclusions that Santa Fe's and UTU's seniority systems were created and maintained with the intention of racially discriminating against the Class. (Id. at 89-90). Based upon its own analysis of the *Teamsters* factors, it found that these seniority systems were not *bona fide* under Section 703(h) [A at 93-97] and that they operated in such a manner as to violate the Class Members' Title VII rights by perpetuating the effects of Santa Fe's and UTU's pre-Act discrimination against the Class. (Id. at 97-100).

Reviewing the lower Court's remedy decision, the Tenth Circuit determined that the District Court had erred, as a matter of law, in concluding that the UTU was not liable for back pay to those Class Members who had no post-Act right to work as Train Porters. (Id. at 101-103). Lastly, it found Trial Court error in the legal conclusion that the typical length of service with Santa Fe of a Class Member retaining post-Act Train Porter seniority rights could not be taken into consideration in determining the level of pay which he would have received absent the discrimination. (Id. at 103-108). However, in its reversal

of these portions of the lower Court's remedy decision, the Tenth Circuit disturbed no factual findings of the District Court.

On July 31, 1981, following the Tenth Circuit's denial of the UTU's Petition for Rehearing and Rehearing *En Banc,* the UTU filed a Petition for a Writ of Certiorari with this Court. [50 U.S.L.W. 3205 (U.S. July 31, 1981) (Case No. 81-221)]. On May 3, 1982, this Court denied the UTU's Petition. (456 U.S. 364).

On June 1, 1981, June 10, 1982 (A at 118-124), July 13, 1982 (Id. at 126-137) and November 23 and 24, 1982 (Id. at 139-160) proceedings were held before the District Court to implement the Mandate of the Tenth Circuit. On December 1, 1982, the District Court entered its Journal Entries of Judgment finalizing its implementation of the Tenth Circuit's Mandate (Id. at 160-165) and the UTU appealed again.

The Tenth Circuit affirmed. Rejecting the UTU's contentions of error in its prior liability determinations (A at 3-4), the Court of Appeals found no abuse of discretion or legal error by the District Court in formulating the Title VII relief herein. (A at 4-10).

On January 15, 1985, the UTU filed its second Petition with this Court. Two of the four QUESTIONS PRESENTED FOR REVIEW in its present Petition are materially identical to the QUESTIONS PRESENTED in its July 28, 1982 Petition to this Court and, primarily, concern the Tenth Circuit's first decision herein. (Compare QUESTIONS PRESENTED numbered 1 and 2 in the instant petition with those numbered 1 and 2 in Case No. 81-221.) The other two questions arise primarily from the Tenth Circuit's second decision herein. (Number 3 and, in part, Number 4).

## REASONS FOR DENYING THE WRIT

**1. Both of the Tenth Circuit's decisions in this case are consistent with the applicable decisions of this Court; no important question of federal law is involved herein which has not been, but should be, settled by this Court.**

**a. This Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) is not in conflict with any of the decisions in this case; no important question of federal law has been decided herein which has not been, but should be, settled by this Court.**

*Ford Motor* is fundamentally distinguishable from this case. Furthermore, Petitioner never urged the Trial Court to apply the back pay tolling principles established by *Ford Motor* to its back pay determinations herein and there was no evidence that Petitioner ever attempted to mitigate its back pay responsibilities to the class or that any class member failed to minimize his back pay damages.

The employer in *Ford Motor* was found liable to the claimants in that case upon a Title VII "disparate treatment" claim: i.e., denial of a vacant position at Ford's parts warehouse, for which claimants were qualified, because of their sex. Approximately eighteen months following claimants' initial denial, Ford made an unconditional offer of employment to two of these claimants who, in turn, declined the offer, choosing to remain in the jobs they had obtained subsequent to their initial rejection. This Court held that, absent special circumstances, these claimants' rejection of Ford's unconditional job offer ended the accrual of Ford's potential back pay liability to these claimants, *Ford Motor, supra,* at 241.

The instant case, in contrast, involves a labor union who was found liable to the Class herein upon a Title VII "disparate impact" claim; i.e., racial discrimination against the Class resulting from the creation and intentional maintenance of a seniority system which segregated all Black Santa Fe employees performing braking duties (Train Porters) from the remaining Santa Fe employees performing braking duties (Brakemen) and which denied Santa Fe Train Porters (Black) the wages and other employment benefits received by the Petitioner's members, the Santa Fe Brakemen and Conductors (White). In contrast with Ford's unconditional employment offer, there is no evidence in this case that the UTU attempted, at any time or in any manner, to ameliorate the discriminatory impact of the seniority system upon the Class.

The UTU had both the power and the duty, as the exclusive bargaining agent for Santa Fe brakemen, to, at the very least, attempt to eliminate the unlawful discriminatory effects of the seniority system against the Class Members, and it failed to do so. Consistent with the applicable authorities of this Court, including *Ford Motor*, and with the District Court's factual findings, the Tenth Circuit has twice so concluded. (A at 97-100 and at 3-4).

There are, quite simply, no circumstances in this case to which a back pay tolling principle akin to the principles in *Ford Motor* can or should be applied. Both earlier decisions of the Tenth Circuit are, for that reason, wholly consistent with *Ford Motor*.

Furthermore, *Ford Motor* was decided by this Court on June 28, 1982, before the District Court's back pay hearings on July 13, 1982 and November 23 and 24, 1982. The UTU first raised its present argument in its brief to the Tenth Circuit in its second appeal. (See BRIEF FOR

APPELLANT in Cases Nos. 82-2549, 83-1726, 82-2550 and 83-1736 at pages 8-9.) This Court should not consider an issue which was neither raised nor argued by the Petitioner to the District Court.

**b. This Court's decision in *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982), is not in conflict with any of the decisions of the District Court or Tenth Circuit.**

The legal principles established by this Court in *General Building Contractors* have no application to the circumstances of this case. There is no inconsistency between the legal principles applied by the Tenth Circuit herein and the legal principles enunciated in *General Building Contractors*. These decisions are thoroughly compatible.

*General Building Contractors* involved questions of liability under 42 U.S.C. §1981. In that case, this Court considered the legal responsibility of the employers and trade associations for the activities of the defendant labor union in operating an exclusive hiring hall system for all operating engineers and would-be engineers.

This case, on the other hand, arises under Title VII and involves no claims under 42 U.S.C. §1981. Moreover, no hiring hall was involved herein. The UTU's liability was predicated solely upon its own activities in intentionally creating and maintaining a non *bona fide* seniority system which had an unlawful discriminatory impact upon the Class. In this case the UTU was *not* found "vicariously" liable by the Tenth Circuit for the hiring practices of Santa Fe under either Title VII or 42 U.S.C. §1981. The theory of *respondeat superior* was never argued by the Class nor was it utilized, in any manner or at any time, by either the

District Court or the Tenth Circuit in any of their opinions. *General Building Contractors* is, for that reason, fully consistent with all of the earlier decisions in this case.

**c. The Tenth Circuit properly applied Rule 52(a) of the Federal Rules of Civil Procedure herein; there is no conflict hereinbelow with this Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1983).**

Both the District Court and the Tenth Circuit explicitly found that the UTU "intentionally" created and maintained the seniority systems here in question for the purpose and with the express intent of discriminating against the Class. (See e.g. A at pages 57, 64, 90-97 and 100-103). Similarly, both of those Courts found that the seniority systems had an unlawful discriminatory impact upon the Class (Id.) although the Tenth Circuit reversed the Trial Court's legal conclusion that *Teamsters* prohibited an award of back pay relief against the UTU to those Class Members who had no post-Act right to work as Train Porters. (Compare A at page 68 with A at pages 100-103).

In so doing, the Tenth Circuit applied the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure to all of the District Court's findings of fact (A at pages 88-89) and found none to be clearly erroneous (A at 89-90). There is no basis for any contention that the Tenth Circuit's decision is in conflict with this Court's decision in *Pullman-Standard v. Swint, supra.*

**d. This Court's decision in *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982), is not in conflict with any of the decisions hereinbelow.**

This Court, in *American Tobacco*, concluded that the immunity accorded seniority systems by Section 703(h)

applies to both pre-Act and post-Act seniority systems. The facts and lower court rulings in that case are fully distinguishable from the facts and rulings by the lower Courts in this case.

It was and is undisputed that the seniority systems herein were in existence both pre-Act and post-Act. In addition, it is clear that both the District Court and the Tenth Circuit afforded these systems all of the immunities accorded by Section 703(h) in these proceedings. Both of those Courts expressly found the seniority systems involved herein were not *bona fide* and both of those Courts properly imposed "disparate impact" liability upon the defendants herein in complete accord with *American Tobacco* and other applicable decisions of this Court.

**2. The relief afforded to the class herein, including the sum designated as the Tax Component, is in accord with this Court's decision in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975) and with other applicable decisions of this Court; no important or recurring question of federal law is involved herein which has not been, but should be, settled by this Court.**

The undisputed evidence before the District Court established that the Class Members herein would pay, on a class-wide basis, a total of $1,280,922.04 more in 1982 Federal and State income taxes than they would have paid if these wages and benefits had been received by them in the years when the wages, benefits and taxes should have been received and paid. (See e.g. page 3 and footnotes 3 to 6, inclusive, of Plaintiffs' and Class Members' Reply to Motion of UTU to Strike Tax Component at R., Volume 10 at page 4030).

The Trial Court rejected the UTU's argument that an award of an additional sum to defer, in part, some of

the tax consequences upon each Class Member of receiving, in one year, more than seventeen (17) years of back pay relief was inconsistent with *Pearson v. Western Electric Company*, 542 F.2d 1150 (10th Cir. 1976) or with any of the other cases cited by the UTU in its instant Petition. (See pages 16-17). Citing the legislative history of Title VII and the principles established by this Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), the District Court awarded the Class herein an additional sum to defer, in part, the diminishment of each Class Member's back pay award by virtue of the federal and state income taxes payable by each Class Member on the award. (A at pages 149-153).

The Tenth Circuit affirmed, finding no abuse of the District Court's broad Title VII discretion in its fashioning of the relief herein. (A at pages 9-10). Significantly, the Tenth Circuit explicitly held that, although appropriate herein, such relief may not be appropriate "in a typical Title VII case". [Compare A at page 9 (Tenth Circuit's opinion) with A at pages 150-151 (Trial Court's opinion)].

It is obvious that the protracted and unremedied illegal practices of the UTU towards the Class herein persuaded both the Trial Court and the Tenth Circuit that in the absence of such relief the Class herein would not be "made whole" or afforded "complete justice" for the economic injury involved herein. See e.g., *Albemarle Paper Company v. Moody, supra,* at pages 418-421. The decision below is fully consistent with all of the applicable authorities of this Court on the federal law regarding damage awards in Title VII and other cases, including *Albemarle, supra,* See also *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980) [Federal Employers' Liability Act] and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) [Outer Continental Shelf Lands Act].

The decision below involves no important or recurring question of federal law. It does not require either the EEOC or other federal courts to consider the impact of taxes upon back pay awards in typical Title VII cases, since the federal and state income tax consequences upon back pay awards in most, if not all, of such cases would be *de minimis*. Compare *Norfolk & Western R. Co. v. Liepelt, supra,* at page 494 and N. 7 with *Blim v. Western Electric Company, Inc.*, 731 F.2d 1473, 1480 (10th Cir.), ..... U.S. ....., 105 S.Ct. 233, 83 L.Ed.2d 161 (1984). The decision below is a factual anomaly and is fully consistent with *Ford Motor* and the other authorities cited in the UTU's instant Petition.

**3. The Petitioner herein waived any purported right under 42 U.S.C. §2000e-5(g) to claim that the District Court should have determined the relative degree of responsibility of the labor union and the railroad employer herein for the back pay award; no important or recurring question of federal law was decided by the Tenth Circuit nor do the circumstances herein afford an adequate factual context for this Court to settle any important federal question which has not been, but should be, settled by this Court.**

On September 8, 1975, following appropriate notice and a hearing, the Trial Court entered an order approving the compromise and dismissal of the Class Members' back pay and attorneys' fees claims against Santa Fe. (A pps. 11-14). The UTU interposed no objection to the entry of this order nor did it argue, at that time, that Santa Fe's liability to the Class herein for back pay or attorneys' fees should be apportioned to the UTU's liability. The UTU did not object to the Santa Fe settlement nor did it raise any "apportionment" issue in the Pretrial Conference Order

herein (R., Volume 4 at pps. 1687-1736). Furthermore, the UTU, in connection with the District Court's initial remedy decision on October 23, 1978, urged the District Court to give the UTU only a *pro tanto* credit for the amount of each Class Member's Santa Fe settlement under their proposed back pay formula. (See DEFENDANT UTU's PROPOSED FINDINGS ON REMEDIAL DETERMINATION at R., Volume 5 at pages 1983-1984).

The Tenth Circuit, in the first appeal herein, rejected, by implication, the UTU's first argument herein concerning "apportionment." [Compare BRIEF FOR UNITED TRANSPORATION UNION AS APPELLANT AND IN RESPONSE TO BRIEF OF SEARS, ET AL., AS CROSS-APPELLEE in Cases Nos. 78-1995, 78-1998 and 78-1997 at pages 31-32 with A pages 103-108 (Tenth Circuit's first opinion hereinbelow)].

Following the first appeal herein, both the District Court (A at pages 141-142) and the Tenth Circuit (A at page 7) held, by implication, that the UTU waived whatever right it had to require that the UTU's and the Santa Fe's degree of responsibility for the back pay award herein be apportioned. Furthermore, as the Tenth Circuit properly noted (Id. at page 6), none of the cases cited by the UTU in its instant Petition (at page 18) are inconsistent with the District Court's rulings herein. (A at pps. 6-7).

Similarly, the cases cited by the UTU which arise under Section 301(a) of the National Labor Relations Act 29 USC §185(a) are not applicable in this Title VII case. See e.g. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 96-97 (1981). Neither *Vaca v. Sipes*, 386 U.S. 171 (1967) nor *Bowen v. United States Postal Service*, 459 U.S. 212 (1983) have been held to require, as the UTU sug-

gests, the apportionment of damages in a Title VII lawsuit.

Considering the UTU's prior waiver of its purported right to have the back pay award apportioned, this case affords the Court neither a proper factual nor legal context in which to consider this issue. More importantly, the decision of the Tenth Circuit does not resolve this issue, one way or the other.

## CONCLUSION

For the reasons stated, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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and

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## TABLE OF AUTHORITIES


Page

**Cases:**

Ford Motor Co. v. Equal Employment Opportunity Commission, 458 U.S. 219 (1982) ..... 1,2

Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973) ..... 2

Hutto v. Davis, 454 U.S. 370 (1982) ..... 2

Maryland v. Baltimore Radio, 338 U.S. 912 (1950) ..... 2

**Other:**

Restatement (Second) of Torts ..... 3

42 U.S.C. §2000e ..... 3

# No. 84-1173

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents erroneously contend that United Transportation Union (UTU) did not raise the issues in *Ford Motor Co. v. Equal Employment Opportunity Commission,* 458 U.S. 219 (1982), in the district court. Petitioner has earnestly urged throughout this litigation that it is not liable for back pay by virtue of the fact that it had no authority or ability to promote the train porters to positions as brakemen. See, e.g., Appendix at page 21 (proceedings during liability phase in 1978) and Appendix at page 97 (Tenth Circuit's summary of Union's position on first appeal, 1981).

The Tenth Circuit, significantly, did not find that UTU had waived this issue. Rather, the Tenth Circuit erroneously reasoned that because *Ford Motor* was argued April 20, 1982, because certiorari was denied in this case May 3, 1982, and because *Ford*

*Motor* was decided by this Court June 28, 1982, that the denial of certiorari was a ruling of affirmance. The Tenth Circuit states:

> [W]e believe that if the Supreme Court had thought [*Ford Motor* and certain other recent Supreme Court cases] required reconsideration of our opinion, it would have granted certiorari and summarily remanded the case for our reconsideration in light of its detemrinations. Appendix at page 4.

The Tenth Circuit, in its opinion of December 10, 1984, Appendix at page 4, 749 F.2d 1451, 1453-54, not only disregards this Court's 1982 decisions, decided since the earlier appeal (1981), but rules that the previous denial of certiorari in this case was an affirmance on the merits.

With the work load of this Court, it must leave to the courts of appeals the primary responsibility for appellate review. Except in extraordinary circumstances, the concept of "judicial ripening" is used by this Court as a means of limiting its certiorari jurisdiction to those cases not subject to further proceedings. *Maryland v. Baltimore Radio,* 338 U.S. 912, 918-19 (1950). The Tenth Circuit Court of Appeals in this case has attached significance to a denial of certiorari (when the case was subject to further proceedings, a remedial stage in the district court) and totally failed to address many substantial questions presented by the appeal. This Court's previous denial of certiorari was not a summary affirmance and should not have been so considered by the Tenth Circuit. *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 366 n.1 (1973). The Tenth Circuit did not accept primary responsibility for the appellate review of this case in spite of admonitions by this Court that it should do so. *Hutto v. Davis,* 454 U.S. 370, 375 (1982).

Respondents erroneously contend that UTU waived its right to request apportionment of damages by not timely raising the issue in the district court. The record in this case clearly

establishes that UTU, during the remedial phase, timely requested the district court to apportion the relative degree of fault attributable to UTU and to reduce the total back pay award accordingly. (R. Vol. VIII at 3152 and 3165). This motion was denied by the district court. Appendix at page 120. On appeal, the Tenth Circuit ruled that apportionment is not available in a Title VII case, stating that this is not "an ordinary case of joint tortfeasors who were liable to each other for contribution. See *Restatement (Second) of Torts* §§886A & comment m, at 337, 343-44 (1979). . . This case is a Title VII action." Appendix at page 5.

Contrary to respondents' assertion that the decision of the Tenth Circuit does not resolve the apportionment issue (Brief in opposition at page 15), the Tenth Circuit clearly rules that a labor union in a Title VII case should *not* have its liability limited "to its 'share' of the fault". Appendix at page 6. The Union did not dispute, nor did it appeal, the Santa Fe's settlement with the class (it was without standing to do so). Rather, it timely raised in the district court at the remedial phase the request that the relative degree of fault attributable to UTU be determined and that the total back pay award be reduced accordingly.

Finally, respondents contend that UTU is "responsible" for back pay for the failure to promote train porters to brakemen positions. This case was submitted to the district court entirely on stipulated facts. UTU was found liable for back pay differentials resulting from the failures to promote when the stipulated evidence conclusively established that it was without power or authority to cause the promotions to occur. 42 U.S.C. §2000e-5(g) provides in pertinent part:

> The court may . . . order . . . back pay (payable by the employer . . . or labor organization, as the case may be, *responsible for the unlawful employment practice*) . . . (emphasis added).

Notwithstanding the respondents' attempts to confuse and obfuscate the facts in this case, the **STIPULATED** evidence provides a straight forward and clear record upon which to adjudicate very important issues raised by the certiorari petition, namely when and to what extent a labor union is "responsible" for back pay in a Title VII case.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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